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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 562

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 2, 1946.

CERTIORARI GRANTED NOVEMBER 12, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. A] [Caption omitted]

[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 3213

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, Appellant,

vs.

RUTHERFORD FOOD CORPORATION, and THE GEORGE KAISER PACKING COMPANY, Appellees.

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT— Filed September 14, 1945

Appellant, L. Metcalfe Walling, states the points on which he intends to rely on appeal, as required by Rule 16 of the rules of this Court, are as follows:

1. The District Court erred in denying the injunction prayed for in the Complaint and in dismissing plaintiff-appellant's Complaint.

2. The District Court erred in finding that the defendants-appellees are not violating and have not violated the Fair Labor Standards Act as charged in the Complaint.

3. The District Court erred in finding and concluding that the relation of employer and employee does not exist between defendants and the beef boners and that the defendants did not suffer or permit the boners to work for them, which finding and conclusion is contrary to the law and the evidence.

4. The District Court erred in finding and concluding that the plan adopted for getting beef boned in the Kaiser plant was not contrary to the principles of the Fair Labor Standards Act.

5. The District Court erred in refusing to find and conclude that defendants transported, offered for transporta-
[fol. 2] tion, shipped, delivered or sold in commerce, or shipped, delivered or sold with knowledge that shipment or delivery or sale thereof in commerce was intended, goods

in the production of which employees were employed in violation of Section 7 of the Act.

6. The District Court erred in finding and concluding that the plaintiff has failed to sustain the burden of proof resting upon him to prove the allegations of his Complaint as to alleged violations of the Fair Labor Standards Act and the probability of future violations so as to justify the issuance of an injunction as prayed, since defendants admittedly propose to, and intend to continue in the future their present employment and wage practices and to ship in interstate commerce goods produced by these employees in violation of Section 7 and other provisions of the Fair Labor Standards Act; and the District Court abused its discretion by failing and refusing to grant the injunction prayed for, since such injunctive remedy is necessary to restrain such future violations and to prohibit the shipment in commerce of goods produced in violation of Section 7 and other provisions of the Fair Labor Standards Act.

7. The District Court erred in the exercise of the discretion vested in it in finding that the plaintiff-appellant has not shown cause for permanently enjoining and restraining the defendants in the face of defendants' continued transportation of goods so produced in violation of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act.

William S. Tyson, Acting Solicitor. Bessie Margolin, Assistant Solicitor. Reid Williams, Regional Attorney United States Department of Labor, Attorneys for L. Metcalfe Walling, Plaintiff-Appellant.

Post Office Address: Office of the Solicitor, United States Department of Labor, 3000 Fidelity Building, Kansas City, Missouri, or Office of the Solicitor, U. S. Department of Labor, Washington, D. C.

[File endorsement omitted.]

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION

CIVIL No. 4965

L. MELCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

RUTHERFORD FOOD CORPORATION, and THE GEORGE KAISER PACKING COMPANY, Defendants.

COMPLAINT—Filed May 17, 1944

I

Plaintiff brings this action to enjoin defendants from violating the provisions of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III

Defendant, The George Kaiser Packing Co., is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Missouri, having its principal office, place of business and manufacturing plant at 81 North First Street in the City of Kansas City, State of Kansas, within the jurisdiction of this Court, and is and at all times hereinafter [fol. 4] mentioned was engaged at that place of business in the production, sale, and distribution of boned beef, offal, and tankage.

IV

Defendant, Rutherford Food Corporation, is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of

Missouri, having its principal office, place of business, and manufacturing plant at 225 Grand Avenue, in the City of Kansas City, State of Missouri, and having an office, place of business, and a manufacturing plant at 81 North First Street, in the City of Kansas City, State of Kansas, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the production, sale, and distribution of boned beef, offal, and tankage.

V

At all times hereinafter mentioned, the defendants employed and are employing approximately 41 employees in and about their place of business in Kansas City, Kansas, in the production of boned beef, offal, and tankage, and in processes or occupations necessary to such production. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce, and have been and are being shipped, delivered, transported, offered for transportation, and sold in interstate commerce from defendants' said place of business to other States.

VI

Defendants repeatedly have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of their employees in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours during the year beginning October 24, 1938, for workweeks longer than forty-two (42) hours during the year beginning October 24, 1939, and for workweeks longer than forty (40) hours since October 24, 1940, without compensating these employees for their employment in excess of forty-four (44), forty-two (42), and forty (40) hours, in work-weeks [fol. 5] during such periods, at rates not less than one and one-half times the regular rate at which they were employed.

VII

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor,

pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VIII

Defendants, employers subject to the provisions of the Act, repeatedly have violated and are violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since October 24, 1938, they have failed to make, keep and preserve adequate and accurate records of their employees and the wages, hours, and other conditions and practices of employment maintained by them, as prescribed by the said regulations.

IX

Defendants repeatedly have violated and are violating the provisions of Section 15(a)(1) of the Act, in that since October 24, 1938, they have shipped, delivered, transported, offered for transportation, and sold in interstate commerce from their said place of business to other states, goods in the production of which many of their employees were employed in violation of Section 7 of the Act as alleged.

X

Defendants have, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defend-
[fol. 6] ants, their officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions

of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

Douglas B. Maggs, Solicitor, Archibald Cox, Associate Solicitor, Reid Williams, Acting Regional Attorney, Henry J. Smith, Associate Attorney, Attorneys for Plaintiff, United States Department of Labor.

Post Office Address: C/o Solicitor of Labor, U. S. Department of Labor, 3000 Fidelity Building, Kansas City, Missouri, or Solicitor of Labor, U. S. Department of Labor, Washington, D. C.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF RUTHERFORD FOOD CORPORATION—Filed June 26, 1944

Comes now Rutherford Food Corporation and for its separate answer to plaintiff's complaint:

1. Admits that The George Kaiser Packing Company is, and was at all times mentioned in the complaint, a Missouri corporation having its principal office and place of business at 81 North First Street, Kansas City, Kansas.

2. Admits that it is, and was at all times mentioned in the complaint, a Missouri corporation having its principal office, place of business and a manufacturing plant in Kansas City, Missouri.

3. Denies that at all times mentioned in the complaint it had an office, place of business and a manufacturing plant at 81 North First Street, Kansas City, Kansas.

4. States that on July 1, 1943, it leased from The George Kaiser Packing Company its packing plant, equipment and facilities at 81 North First Street, Kansas City, Kansas, and thereafter operated said plant under Government inspection until May 1, 1944, when said lease was [fol. 7] cancelled and this defendant's Federal license surrendered; that in August, 1943, it applied for authority

to do business in Kansas and designated its registered office as 81 North First Street, Kansas City, Kansas.

5. Denies the allegations of paragraph "V" of the complaint.

6. States that during the period of July 1, 1943 to May 1, 1944, it employed approximately 30 to 35 persons in the operation of said packing plant and a substantial portion of the meat and products of the plant went into interstate commerce.

7. Denies that it had any employees engaged in the boning of beef and states that, though its employees slaughtered and dressed beef carcasses, such of the carcasses as it had boned were boned by independent contractors.

8. Denies the allegations of paragraph "VI" of the complaint.

9. Admits the allegations of paragraph "VII" of the complaint.

10. Denies the allegations of paragraphs "VIII", "IX" and "X" of the complaint.

11. States that, at all times since the Fair Labor Standards Act became effective and now, it has made and is making every effort to comply with the Act and the Regulations issued pursuant to it; that while it had approximately 30 persons employed at the packing plant from July 1, 1943, to May 1, 1944, if employed during the same period, and prior thereto, at its principal plant in Kansas City, Missouri, approximately 75 to 90 employees, and the operation of the packing plant was only a small part of its entire business; that if, as it has been advised orally by attorneys for plaintiff, there were instances where the administrative employees at the packing plant failed to keep adequate and accurate records as prescribed by plaintiff's regulations as to a small number of casual and miscellaneous employees, such omissions, if any, were inconsequential in nature and the result of a misinterpretation of [fol. 8] the Act and Regulations by administrative employees at the packing plant and such omissions, if any, were not known to the officers and officials of this defendant; that in its operation of its business this defendant has

made an earnest and sincere effort to comply with the Act and Regulations, as is shown by the fact that in the operation of its principal business, inspections which have been made by the plaintiff or his predecessor have shown that the Act and Regulations have been complied with; that if this defendant has failed or neglected to comply with the Act or any regulation issued by the plaintiff, which it does not admit, such failure or neglect has been wholly involuntary and would have been immediately corrected if discovered and has been inconsequential and unsubstantial compared with the substantial compliance by it; that defendant on May 1, 1944, and prior to the filing of this suit, ceased its operation of the packing plant and has since disposed of all interest therein; that the issuance of an injunction against this defendant would be of no benefit to plaintiff and serve no purpose, but would cause great and irreparable injury to this defendant.

12. Denies every allegation in the complaint not herein specifically admitted.

E. R. Morrison, 1701 Bryant Building, Kansas City 6, Missouri; R. L. Hecker, 420 Brotherhood Block, Kansas City, Kansas, Attorneys for defendant, Rutherford Food Corporation.

Copy received June 24, 1944.

Henry J. Smith, Attorney for Pl.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE GEORGE KAISER PACKING COMPANY—Filed June 26, 1944.

Comes now The George Kaiser Packing Company and for its separate answer to plaintiff's complaint:

1. Admits that it is and was at all times mentioned in the complaint, a Missouri corporation authorized to do business in the State of Kansas and having its principal office and place of business at 81 North First Street, Kansas City, Kansas.

2. Admits that the Rutherford Food Corporation was

at all times mentioned in the complaint, a Missouri corporation, having its principal office, place of business and manufacturing plant in Kansas City, Missouri.

3. Denies that the Rutherford Food Corporation at all times mentioned in the complaint had an office, place of business and a manufacturing plant at 81 North First Street, Kansas City, Kansas.

4. Denies the allegations of paragraph "V" of the complaint.

5. States that except for the period July 1, 1943 to May 1, 1944, it did at all times employ a varying number of persons (always less than 41) in the operation of a packing plant at 81 North First Street, Kansas City, Kansas, and that a substantial portion of the meat and products of the plant went into interstate commerce; that during the period July 1, 1943, to May 1, 1944, it had no Federal license and did not operate any slaughterhouse or packing plant, but during said time it did have five or six employees and did buy and sell some meat offal and tankage.

6. States that prior to the middle of October, 1942, very little boned beef was produced at its packing plant; that since said time (except for the period July 1, 1943 to May 1, 1944), it has sold a considerable amount of boned beef, but, though its employees have slaughtered and dressed the beef carcasses, it had no employees engaged in the [fol. 10] boning of beef and all boned beef which it sold was boned by independent contractors.

7. Denies the allegations of paragraph "VI" of the complaint.

8. Admits the allegation of paragraph "VII" of the complaint.

9. Denies the allegations of paragraphs "VIII", "IX" and "X" of the complaint.

10. States that at all times since the Fair Labor Standards Act was adopted and now it has made and is making a sincere effort and earnest effort to comply with said Act and the Regulations pursuant to it, and has endeavored to keep such records as would comply with the regulations issued by the plaintiff or his predecessor in office, and has

paid each of its employees entitled thereto for all hours in excess of those specified in the Act at a rate not less than one and one-half time the regular rate at which employed; that through inadvertence and misapprehension of the Act it may have failed to keep records to plaintiff's satisfaction with respect to certain casual workers and miscellaneous employees, but that as soon as its attention was directed to these instances by plaintiff immediately prior to the filing of this suit, it at once took steps to see that its records were kept as plaintiff suggested they should be; and that if it has failed and neglected to comply with the Act or any Regulation issued by the plaintiff, which it does not admit, such failure or neglect has been involuntary and has been and will be corrected upon discovery and has been inconsequential and unsubstantial compared with the substantial compliance by it; that the issuance of an injunction against this defendant would be of no benefit to plaintiff and serve no purpose, as this defendant has complied and intends in the future to comply with the Act and Regulations to the best of its ability, whereas, the issuance of an injunction would cause great harm and irreparable injury.

[fol. 11] 11. Denies every allegation in the complaint not herein specifically admitted.

E. R. Morrison, 1701 Bryant Building, Kansas City, Missouri; R. L. Hecker, 420 Brotherhood Block, Kansas City, Missouri, Attorneys for Defendant, The George Kaiser Packing Company.

Copy received June 24, 1944.

Henry J. Smith.

(File endorsement omitted.)

In United States District Court

Stipulation of Facts—Filed January 24, 1945

1. For the purpose of expediting the trial of this case, the following facts are stipulated and agreed to for use in evidence in this case only and all or any part of them may be offered in evidence herein by any party subject to objection as to relevancy and materiality by any other

party, but they shall not be considered as admissions or be binding on any party in any other cause or proceeding, to-wit:

I

2. "Kaiser plant", as used herein, shall be deemed to refer to the slaughterhouse as 81 North First Street, Kansas City, Kansas, the principal place of business of defendant, The George Kaiser Packing Co., herein called "The Kaiser Co." "Rutherford plant", as used herein, shall be deemed to refer to the canning factory of defendant, Rutherford Food Corporation, herein called "Rutherford Corp.", at 225 Grand Avenue, Kansas City, Missouri. "Administrator", as used herein, shall be deemed to mean plaintiff or his predecessor in office, and "Act" shall be deemed to mean the Fair Labor Standards Act. "Plant operator", as used herein, shall refer to defendant, Rutherford Food Corporation from July 1, 1943 to May 1, 1944, and to defendant, The George Kaiser Packing Co., for all periods before and after said dates.

[fol. 12] 3. The defendants' operations at the Kaiser plant have been inspected only two times by the Wage and Hour Division of the United States Department of Labor, once from August 14, 1942 to September 12, 1942, referred to hereinafter as the "first inspection", and once from January 21, 1944 to March 14, 1944, referred to hereinafter as the "second inspection."

II

4. The Kaiser plant has been a slaughterhouse under Federal inspection since 1890. The Kaiser Co. was incorporated in Missouri in 1935 and immediately qualified to do business in the State of Kansas and took over operation of the Kaiser plant. For about 15 years prior to that time it had been operated by Paul O. Kaiser, and prior to that, by his father George Kaiser, for 30 years.

5. Prior to March, 1943, 51 per cent of the capital stock of The Kaiser Co. was owned by one Lionel Benjamin, and Paul O. Kaiser owned the other 49 per cent. In March, 1943, the Rutherford Corp. acquired Benjamin's stock (and a $10,000.00 debenture he held) paying $20,000.00 therefor, The Rutherford Corp. had contracts to

supply the United States Army with large quantities of canned chili and was having trouble in getting an adequate supply of boned beef for the chili at the ceiling price. It had been purchasing most of such meat from one source, but had been notified by that source that it would not furnish more meat at the ceiling price. By acquiring a controlling stock interest in The Kaiser Co., the Rutherford Corp. thought it could assure itself of a steady supply of meat. Before buying said stock, Rutherford Corp. had given consideration to the purchase of the Kaiser plant or some other packing plant.

6. The Kaiser Co. could not sell boned beef at the ceiling price and buy cattle and pay its operating costs, so the Kaiser Co. was operating at a loss before March, 1943 and continued to do so after Rutherford Corp. bought its stock. The Rutherford Corp. had to advance money to The Kaiser Co., and by July 1, 1943, The Kaiser Co. was indebted to Rutherford Corp. to the amount of $51,347.04 on open account in addition to the $10,000.00 debenture. To avoid further operation of The Kaiser Co. at a loss and [fol. 13] to assure itself a future supply of meat, on July 1, 1943, the Rutherford Corp. leased the Kaiser plant from The Kaiser Co. and took over its operation, which lease was cancelled by mutual agreement on May 1, 1944. A copy of said lease is attached hereto, marked "Exhibit 5", and by reference made a part hereof. The Kaiser plant was subject to Reconstruction Finance Corporation first mortgage of $20,000.00 and that agency's approval of the lease was obtained.

7. The Kaiser Co. had no Federal license to slaughter from July 1, 1943 to May 1, 1944, and during such period Rutherford Corp. was licensed as a slaughterer by the Livestock and Meats Branch of the War Food Administration. On May 1, 1944, this license was cancelled and a license reissued to the Kaiser company. During the time that the lease was in effect the Rutherford Corp. took over the entire Kaiser pay roll, including Paul O. Kaiser as manager (with the exception of certain employees hereinafter named for only part of the period) and its method of handling the pay roll and its operation of the Kaiser plant was in substantially the same manner as that of The Kaiser Co. immediately prior to July 1, 1943.

From November 1, 1943 to May 1, 1944, The Kaiser Co. employed the following persons in the positions indicated, and they were taken off the Rutherford Corp. pay roll, to-wit: John H. Edmundson, office; Mildred Dale, office; Pete Medvid, cooler; Forrest Inman, cooler; Martin Gunderson, cooler; C. J. Holstrom, tank house; Nice Patton, tank house; Pete Hansen, tank house.

8. During the period Rutherford Corp. operated the Kaiser plant, it sold The Kaiser Co. at slightly under ceiling prices such parts of the slaughtered cattle as it could not use for chili or other canned meat, such as the hides, cheek meat, variety meats, tenderloins, offal, etc., as well as a few carcasses for sale by The Kaiser Co. to its City trade.

9. Starting in November, 1943, the United States Government made provision through the agency of Defense Supplies Corporation to pay to nonprocessing slaughterers of beef an additional subsidy of 80¢ per hundred pounds live weight of all cattle slaughtered. This was in addition to a subsidy then being paid all slaughterers of 50¢ a [fol. 14] hundred pounds. This was necessary because the low ceiling price on beef was inadequate to permit a slaughterer to purchase cattle, on which there was no ceiling price, and to pay operating costs. The additional subsidy on the kill at the Kaiser plant would amount to $10,000.00 to $12,000.00 a month. Without this subsidy the operation of the Kaiser plant by the Rutherford Corp. had been unprofitable. Officials of the Rutherford Corp., if called as witnesses in this action, would testify that the Rutherford Corp. had determined that the corporation would not renew the lease when it expired July 1, 1944, expecting that if The Kaiser Co. could get the subsidy it could resume the operation of the plant and operate at a profit.

10. The lease was cancelled May 1st, to enable The Kaiser Co. to apply for this subsidy. Upon investigation, it was determined that under the regulations of the Defense Supplies Corporation, The Kaiser Co. could not qualify for the subsidy as long as any processor, such as the Rutherford Corp., owned, directly or indirectly, more than 10% of the stock. In the latter part of May, 1944, consideration was given to the purchase by George Van

Voorst, an officer of the Rutherford Corp. of that portion of the stock in The Kaiser Co. which was owned by the Rutherford Corp. Such plan was abandoned upon advice of the Reconstruction Finance Corporation and also upon legal advice that the Defense Supplies Corporation would probably consider that as an indirect control by the Rutherford Corp. As without the subsidy, it appeared that The Kaiser Co. could not operate profitably, the Rutherford Corp. decided it would be to its advantage to dispose of its stock in The Kaiser Co. and, accordingly, on June 19, 1944, the Rutherford Corp. sold its stock in the Kaiser Co. to Paul O. Kaiser for a consideration of $1,000.00, and the stock was transferred to him, and on the same date The Kaiser Co. paid off the $10,000.00 debenture held by the Rutherford Corp. (interest being waived) by a check on its account in the Merchants Bank of Kansas City.

11. In the purchase of the 51 shares of stock Paul O. Kaiser gave his check for $1,000.00 to the Rutherford Corp. with the understanding that it was to be held until he could raise the money to make it good. In the latter [fol. 15] part of August, 1944, George Van Voorst paid Rutherford Corp. the $1,000.00 for Paul O. Kaiser, and his check was returned to him. On December 28, 1944, Paul O. Kaiser paid George Van Voorst cash in the sum of $1,000.00 and interest in the amount of $10.00 for said check.

12. In connection with the cancellation of the lease The Kaiser Co. agreed to purchase from the Rutherford Corp. the cattle, meat, etc., belonging to the latter company, at the Kaiser plant or in public storage plants. The amount of this inventory, plus the amount due the Rutherford Corp. by the Kaiser Co. for hides, cheek meat, variety meats, etc., amounted to $41,172.68. The Rutherford Corp. agreed to accept payment of this sum in meat. While The Kaiser Co. had about $42,000.00 in the bank on May 1, 1944, such capital was soon depleted, as it was supplying Rutherford Corp. meat to apply on its debt and had little cash coming in from other sources. After The Kaiser Co. paid the $10,000.00 debenture it was necessary for it to borrow $10,000.00 for operating purposes. The Rutherford Corp. lent it

the money, taking the note of The Kaiser Co. On August 31, 1944, this note was cancelled and the balance of this debt was transferred to open account with the understanding it could be paid in meat. During all this period The Kaiser Co. had a large inventory of variety meats, etc. which it required time to liquidate. The value of this inventory at times ran as high as $20,000.00 or $25,000.00.

13. In addition, in the period after June 19, 1944, and to October 20, 1944, when The Kaiser Co. was in need of cash for the purchase of cattle, it was the practice of the Rutherford Corp. to "advance" sums of money to The Kaiser Co. early in each week against the meat it would get later in the week. During such period The Kaiser Co. was continuously indebted to the Rutherford Corp. in varying amounts. During such period The Kaiser Co. could not get bank credit, but by October 20, 1944, it had liquidated its inventory and reduced its debt and it was able to and did borrow $10,000.00 from the Merchants Bank. Since October 20, 1944, The Kaiser Co. has not been indebted to the Rutherford Corp.

14. Prior to March, 1943, the Rutherford Corp. had [fol. 16] done little or no business with The Kaiser Co. From March, 1943 to July 1, 1943, and since May 1, 1944, and to the present time, the Rutherford Corp. has purchased about 90 per cent in value of the output of the Kaiser plant. The only plant of the Rutherford Corp. (except the Kaiser plant during period of the lease) is the one at 225 Grand Avenue, Kansas City, Missouri, and in that plant it does not have and has not had facilities for the slaughtering or boning of beef.

15. Since the middle of October, 1942, practically the entire output of the Kaiser plant has gone to war agencies of the government, either directly or through processors. The Rutherford Corp. has army contracts for canned chili, nearly all of which is shipped by it in interstate commerce, into which goes most of the boned beef it purchases from The Kaiser Co., and there is constant pressure and urging by the procurement agencies for greater production.

16. Since October, 1942, over 90 per cent of the production of the plant operator has moved regularly in interstate commerce.

III

17. Prior to October, 1942, one hourly paid employee, known as a combined butcher, beef boner and order filler, was employed in the cooler of the Kaiser plant. This man devoted a portion of his time to boning loins and other cuts of better grade cattle in filling orders for the meat shop trade. No other type of beef boning was performed at the Kaiser plant prior to said date.

18. In the summer and fall of 1942, United States Government contracts entered into by various processors required the furnishing of a great amount of beef boned to army specifications. The Kaiser Company desired to get into the business of furnishing such boned beef, and the president, Paul O. Kaiser, made various inquiries with regard to the subject. These inquiries came to the attention of one Jim Reed who had had experience in boning beef, both in Kansas City and elsewhere. He and a man named Peterson had been employed for a short time by other Kansas City packing companies, Reed [fol. 17] at Kansas City Dressed Beef Company upon an hourly basis doing boning, and Peterson at Armour upon piece work basis doing boning.

19. Reed advised Mr. Kaiser that he had worked for two packing companies in St. Louis under a plan which was later embodied into a written contract between The Kaiser Co. and Reed and Peterson, a copy of which is marked "Exhibit 1," attached hereto and made a part hereof.

20. Reed and Peterson got together a group consisting generally of themselves and about four other boners who performed the boning work at the plant pursuant to said contract until about February 12, 1943, at which time Reed and Peterson abandoned the boning work without notice and Adolph Schindel, an experienced boner, who had been working at the plant as a boner, remained at the plant and took over the boning work under an oral agreement to continue under the terms of the Reed contract, and assembled a similar group. Schindel and the other boners performed the boning work for the period from February 12, 1943, until about the middle of May, 1944; through this period the number of boners working at any one time varied from three to eight,

averaging about six, depending upon the amount of beef to be boned and other factors. In May of 1944 Schindel abandoned the boning work without notice, and his place was taken over upon the same basis by Hooper and Deere, both of whom had been working in the plant as boners.

21. Hooper and Deere and the other boners working with them performed the boning work until about October, 1944, when Deere, for personal reasons, was compelled to quit work for a time and gave up his connection with Hooper. On the 28th day of October, 1944, Hooper entered into a written contract with The Kaiser Co., a copy of which, marked "Exhibit 2," is attached hereto and made a part hereof whereby he agreed to carry on the boning commencing November 1, 1944. Hooper and other boners are currently performing the boning work at the Kaiser plant. In the summer of 1944, boners Schindel and Behrens left the boning operations at the Kaiser plant to enter into the roofing business for the summer, were in that business for three or four months, and then returned and are now boning at the Kaiser plant. Deere is now again boning at the Kaiser [fol. 18] plant. At all times the boner or boners who had entered into a written contract or oral arrangement with the plant operator worked full time at the boning tables side by side with the other boners.

22. The boning has always been performed upon the Kaiser plant premises in an area known as the boning vestibule. Attached hereto, marked "Exhibit 3," and by reference made a part hereof, is a diagram of the floor space of the Kaiser plant. Cattle are killed on the killing floor, skinned and dressed; the carcasses thereafter move by means of an overhead rail system, shown on Exhibit 3, first to the hot cooler for overnight cooling, then to the cooler for temporary storage, then to the boning vestibule for boning if the carcasses are to be boned; and then to the enclosed dock as barrels of boned meat, bones, etc.

23. Prior to October, 1942, the boning vestibule was used as an order room. The cooler foreman had a desk in his room and besides taking orders, some cutting up of carcasses, commonly known as breaking, was per-

formed therein. At that time nearly all of the meat was moved directly from the cooler room through this vestibule to the dock which was then open, and there loaded into trucks. The dock has been changed from an open dock to an enclosed dock since the company began the boning of the government beef and is in effect a large room at the present time.

24. Currently approximately 65 cattle are killed each day on the killing floor; this number has varied upward somewhat, but has never exceeded 100 per day. The capacity of the cooler is about 300 carcasses. In the normal operation of the plant cattle are killed one day, placed in the hot cooler immediately, moved to the cooler the next morning, and are boned within the next 12 to 24 hours. Thus, the entire operation from the killing to the placing of the boned beef upon the enclosed dock normally takes 48 hours, or slightly more. The carcasses are in the best condition for boning when they are 24 to 48 hours old, and are in fact ordinarily boned at such time.

25. The boning vestibule is 19 ft. x 22 ft. in size, its position in the plant being indicated on Exhibit 3. Also attached hereto, marked "Exhibit 4", and made a part [fol. 19] hereof, is a diagram of the boning vestibule, showing the overhead rail system running through the boning vestibule; and the rail detour in the form of a U for the use of the boners in the boning operations. The boners work in the vestibules along two long tables shown at the left of Exhibit 4. Indicated by circles on Exhibit 4 are barrels into which the boned meat, bones, fat, etc. are thrown. The rectangle shown in the center of the boning vestibule is a small table at which a trimmer works.

26. "Trimming" consists of removing small pieces of meat from fat and cartilage, which meat is thrown by the trimmer into the barrels along with the boned meat. The trimmer also trims fat off of kidneys and tenderloins which do not go into the boned meat. The boning vestibule contains no other equipment than the tables, barrels, and overhead rails referred to.

27. The beef carcasses hanging on the rail are moved from the cooler into the boning vestibule by laborers or by

cooler men employed by the plant operator. While the carcasses are still on the main rail in the boning vestibule the men who have moved them in make a final check of the carcasses and remove any little pieces of hide, fat or dirt, after which they weigh the carcasses on the rail scale and then switch them onto the boners' detour rail. The carcasses in the cooler are in a completely dressed state and, if they are not to be boned, they are moved directly through the boning vestibule over the rail scale to the enclosed dock for delivery. After the carcasses are switched onto the boners' detour rail, they are not further handled by the laborers or cooler men.

28. Cattle boned in the Kaiser plant are of the lower grades (canner, cutter and a few utility) and small in size, 350 to 500 pounds dressed weight. When the carcasses are switched onto the boners' rail they are completely dressed and have been split down the backbone. They hang from the rail head end down. The first boner unjoints the back at the first rib which lets the forequarter of the animal drop to the boning table. He then cuts off the shank of the forequarter and removes the meat over the shoulder, after which he turns over the quarter and unjoints [fol. 20] the neck. The frame is then passed on to the next man or so for further removal of meat from the bones. In the meantime, after the forequarter has been dropped to the table, the hindquarter moves along the rail to two or three men on around the rail, who take out the kidneys and remove the meat from the bones of the hindquarter. The boners hold the pieces of meat to be boned with a hook in their left hand and cut it from the bones with a knife. The exact division of the different steps of the boning among the boners is determined by themselves and is dependent on the number of boners working at a given time, the skill of the boners, and other factors.

29. Army specification beef boning in the larger packing plants such as Armour's and Swift's, and at Kansas City Dressed Beef Co., is done by a somewhat different method than that used in smaller packing plants such as the Kansas City plant of the Campbell Soup Company (formerly Kornblum Packing Company) and the Kaiser plant. In the larger packing plant a half of a beef carcass is cut into seven sections by power saws; thereupon

the sections are conveyed upon belts to boners who remove the meat from the bones with hooks and small knives as at the Kaiser plant.

30. As the meat is removed from the bones it is thrown by the boners into barrels or to the trimmer. As the barrels are filled they are removed from the boning vestibule to the dock, weighed and put on trucks by employees of the plant operator. The empty barrels are brought into the boning vestibule and the full barrels removed by the laborers above referred to; occasionally truck drivers or other employees of the plant operator take in or remove the barrels. The barrels are washed in a room at one end of the dock, as shown on Exhibit 3. One employee of the plant operator devotes his full time to the washing of barrels. The boners do not handle the barrels.

31. The tables, barrels and rails in the boning vestibule and used in connection with the boning are owned by The Kaiser Co. Although rent is provided for in paragraph (1) of the current boning contract (Exhibit 2), none has been paid, Hooper contending that the agreement to pay rent was contingent upon oral conditions that have not [fol. 21] been complied with. At no time have the boners paid any rent for the use of the boning vestibule or any other fee or charge of any kind for any space, equipment, or service, to the plant operator.

32. The only tools used by the boners are a small knife (used in the right hand), a small hook (held in the left hand), and a hand sharpener. Such tools are individually owned. Protective leather belts worn by the boners are individually owned; white aprons worn by the boners are provided and laundered by the plant operator. At no time has any boner owned any interest in cattle boned or any stock or interest of any kind in either The Kaiser Co. or the Rutherford Corp. No boner who has ever boned at the Kaiser plant has ever owned, leased, or supplied premises for boning operations at the Kaiser plant or elsewhere, with the exception of the leasing agreement covered by Exhibit 2, aforesaid.

33. The trimmer and laborers, heretofore referred to, as well as the barrel washer and various others who work in and out of the boning vestibule, are employees of the plant

operator, do not share in the boning money and are not paid by the boners. They are paid directly by the plant operator upon an hourly basis with time and one-half after forty hours in the workweek.

34. Most of the boners who have worked in the boning vestibule have on occasion worked as employees in other packing plants in the Kansas City area on night shifts when they were boning at the Kaiser plant during the day. Most of the boners who have worked in the boning vestibule have worked at other periods of time in various packing plants in the Kansas City area and other cities upon various working arrangements, including hourly pay, piece work and sharing. When Reed left the Kaiser plant he made an arrangement with the Kornblum Packing Company comparable to that which he had had with the Kaiser Co., which has been carried on by him and successors.

35. At all times since October, 1942, and consideration paid by the plant operator for beef boning has been upon the hundredweight basis, 40 cents per hundredweight prior to January, 1944, and 45 cents per hundredweight thereafter. Such payment for boning has been made [fol. 22] by weekly check of the plant operator. During the period October, 1942, until February, 1943, all checks were made payable to Jim Reed; from February, 1943, until May, 1944, all checks were made payable to Otto Schindel; and since May, 1944, all checks have been made payable to Frank Hooper. During the period that the checks were payable to Reed or Schindel, there was an equal division of the boning money among all the boners, except that one or two part-time, occasional or inexperienced boners were paid by the hour at the rate of $1.25 or $1.50 per hour out of the money that had been paid to Reed or Schindel. During the period from May, 1944, until October, 1944, the money paid to Hooper was divided equally between Hooper and Deere, after paying three or four boners they hired from time to time at the rate of $1.35 to $1.50 per hour, except that toward the end they "cut in a couple of other boners on the split." Since November, the money paid to Hooper has been and is being divided equally among the five to seven boners doing the boning, including Hooper. No record has ever been or is being kept of the hours worked by those boners

sharing equally in the division of the boning money. A record has been kept of the hours worked by boners working on an hourly basis, particularly since Hooper has been receiving the boning checks. At all times while boning, Reed, Peterson, Schindel, Hooper and Deere have received the same share out of the boning checks as was received by the other sharing boners and have received nothing for days they individually did not bone while other shares did bone. Earnings of sharing boners have varied under different conditions, but for the purpose of this case it may be assumed that a competent group of boners will bone an average of approximately 350 to 400 pounds per man per hour. The man boning thighs and other fleshy portions of the carcasses bones a much greater poundage and the man boning ribs, necks and thinly fleshed parts, bones much less.

36. Hooper has paid all hourly paid boners time and a half for any hours worked over forty since May, 1944; otherwise no hourly paid boner or sharing boner has ever received time and one-half for hours worked in excess of forty in any workweek. Hooper has deducted the Social Security and Withholding Taxes from money paid to such [fol. 23] hourly paid boners, and also from money paid to those sharing in the division of the boning money; and Hooper has reported and paid such taxes so deducted. Reed, Peterson and Schindel on no occasion deducted the Social Security Taxes from money they paid to or divided with hourly paid or sharing boners. The weekly hours of boners have varied at different times, but for the purpose of this case it may be assumed that most of the boners have worked in excess of forty hours in one half of all work weeks since October, 1942, and it may be assumed that such overtime hours have ordinarily been from 2 to 5 in the workweek.

37. The plant operator has never exercised any direction or control over any sharing or division of the boning money and has no direct knowledge of how the division is and has been made or determined, or of what boners have been hourly paid or their rate of pay.

38. At no time has the plant operator kept any records with reference to the boners, except that the plant operator

has kept complete and accurate records of the weight of beef boned, and a complete and accurate record of the weekly sums paid for said boning as aforesaid on the aggregate weight of the boned beef on a hundredweight basis.

39. At no time has the plant operator, through Paul O. Kaiser or any other company official, exercised direction or control over who shall work as boners or engaged the services of any boner or made any arrangements, contract, or agreement with respect to compensation with any boner, except in the instances of the arrangements with Reed, Peterson, Schindel, Deere and Hooper, as aforesaid, and except in the instance of one Dolinar, whose employment by Reed as a boner was directed by The Kaiser Co. (see Exhibit 1 attached hereto, paragraph 12). The plant operator has not directed the boners to start their work at any set time, to leave at any set time or fixed their luncheon or other rest periods. They have determined their own hours of work, though in general their hours of work on a given day would correspond to the hours other work in the plant was in progress. They have boned on days when there was no "kill" and cattle have been killed on days on which they [fol. 24] did not bone. Such plant operator employees as the barrel washer, laborers handling the barrels, etc., of course work about the same hours as the boners.

40. The Kaiser plant has had continuous successive union contracts with the Packing House Workers Organizing Committee, Local No. 36 (C.I.O.), since 1941, providing for a closed shop and check-off system and recognizing such union as the sole collective bargaining agency for all maintenance, piece workers and production workers in its Kansas City plant. Jobs are classified and wage scales and working conditions in the plant are determined by these contracts. The boners are not classified or mentioned in any of these contracts, and the Union has not at any time asked that they be brought under the plant contracts. However, the Union has required that all boners be members of the Union. The boners have all been members of the same Union, but the plant operator has not collected their dues and the check-off system has not been applicable to them and they are not represented by or subject to any control by the steward of the Union at the plant. The plant operator has at no time included the boners in its Work-

men's Compensation liability policy, and such boners as have been cut or otherwise injured while boning have paid their own medical attention. The plant operator has not at any time made any deduction from the checks payable to Reed, Schindel, or Hooper for unemployment compensation taxes or withholding taxes. No application has ever been made by either the plant operator or any boner to the Regional War Labor Board for approval of sums or rates paid to boners collectively or individually by the plant operator or by any boner.

IV

41. Robert G. Renn, 903 Tenny Street, Kansas City, Kansas, is employed currently at the Kaiser plant as foreman in the tank house, operating the cooker in the tank house and doing general repair and maintenance work. He has worked for the plant operator since 1929 in a similar capacity; he was hired by Paul Kaiser. Prior to October 24, 1938, the plant operator paid this employee on a straight [fol. 25] salary basis of $30.00 per week. Beginning October 24, 1938, the plant operator commenced paying this employee a straight salary of $30.09 per week, and showed 54 hours on his pay check as the hours worked each week. Beginning October 24, 1939, the plant operator showed 52 hours as the hours worked on this employee's pay check, and continued to pay him a straight salary of $30.09 per week until June 21, 1941. In fact, this employee's hours were not reduced on October 24, 1939, nor at any time in the year 1939, but throughout the period beginning several years prior to 1938 and continuing to the present time, this employee has always worked fluctuating hours which have varied from less than forty to seventy-eight hours per week.

42. Prior to June 21, 1941, no actual record of this employee's hours worked was kept by plant operator; however, commencing on that date, a time clock was installed in the plant and Renn and most of the other employees of the plant started punching the time clock. From that date until the present time a record of Renn's actual hours of work has been kept by means of a time clock. Said record shows that he worked hours varying from 29½ to 78 in the workweek. For example, in each of the workweeks ending July 12, 1941 and July 26, 1941, his time card showed that he worked 70 hours; in the workweek ending March 4, 1942 his time

card showed that he worked 78 hours. Beginning June 21, 1941, this employee's weekly salary was increased from $30.09 to $32.90, and his pay roll record beginning on said date indicates 60 hours worked each workweek, instead of the actual hours shown on his time card which frequently exceeded 60. Prior to November, 1941, the date of plant unionization, The Kaiser Co. failed to pay overtime in accordance with the Act to certain other employees.

43. Prior to October, 1942, Renn was not employed on an hourly wage and he was never informed that he was on an hourly wage, nor did he know of any hourly wage applicable to his employment. On November 2, 1942, Renn was paid by The Kaiser Co. the gross sum of $383.79 in back overtime wages computed on the basis of an estimated 58-hour average workweek as a result of the first inspection of The Kaiser Co. by the Wage and Hour Division of the United States Department of Labor.

[fol. 26] 44. Since October, 1942, Renn has been paid on an hourly basis at rates varying upward to 75 cents per hour, which is his current rate, with overtime for all hours worked in excess of forty in the workweek at the rate of time and one-half his regular rate of pay, except for certain call-in work which he has not shown on his time card, though subsequent to the institution of this suit he has been instructed to show any such time. Such call-in work consists of being called from his home three-quarters of a mile away to repair machinery, the operation of which has been interrupted. Such trips ordinarily take less than one-half hour and Renn usually spends from ten to twenty minutes at the plant.

V.

45. Joseph T. Haskins, 1112 Ella Street, Kansas City, Kansas, has been employed as cattle driver and assistant buyer at the Kaiser plant for about 25 years. He has always been paid a straight weekly salary. As a result of the first inspection by the Administrator, Haskins was paid on November 2, 1942, the gross sum of $158.55 back overtime wages by The Kaiser Co. computed on the basis of an estimated average 47-hour workweek.

46. Haskins' duties are largely away from the plant and at the Kansas City stockyards. He usually starts his

day's work at the yards and leaves from there so he has never punched the time clock at the plant. During the months of February and March, 1942, and since the middle of August, 1942, he kept his time pencil entries on the plant operator's time cards and turned them in at the Kaiser plant. The cards he kept in February and March, 1942, showed from six to twelve hours a day and from 40 to 47⅔ hours a week. The cards he kept from the week ending August 29, 1942, to the week ending November 25, 1942, showed from five to ten hours a day and from 31 to 48 hours per week. From November 25, 1942 to May 17, 1944, his cards showed eight hours for five days each week worked, being Monday through Friday, inclusive, 40 hours per week. From May 17, 1944 to the end of 1944, his cards showed he worked from five to eight hours each day and from 25 to 40 [fol. 27] hours each week worked. His hours have never been regular and the plant operator should have known that he was not working five 8-hour days in the period from November, 1942 to May 17, 1944.

47. Prior to August 21, 1942, the pay roll records show an hourly rate of 60 cents, and 90 cents for overtime, with a guarantee of $30.00 a week. From then to March 15, 1943, the pay roll records show an hourly rate of 65 cents and 97½ cents for overtime, with a guarantee of $35.00 per week. From March 18, 1943, to the present time the pay roll records show only $40.00 per week without mentioning the word "guarantee." Haskins considered he was on a weekly salary regardless of hours worked. He was never paid more or less than the weekly salary shown on the record. Application was made to the War Labor Board for approval of the increase from $35.00 to $40.00 in the summer of 1944, and that agency refused to give retroactive approval and approved the increase as effective July 22, 1944.

VI

48. Viola T. Dunn was hired on April 21, 1943, as an office clerk at the Kaiser plant on a straight salary basis of $30.00 per week for a regular 41½-hour workweek. She worked these hours until September 1, 1943, when she left the Kaiser plant. She did not receive any extra or additional compensation for the 1½ hours in

excess of forty beyond her salary of $30.00 per week, which was understood by both parties to fully compensate her for hours worked. Immediately prior to her employment at the Kaiser plant she was employed at the Rutherford plant as an office clerk.

VII

49. Mildred Dale, 66 South 15th Street, Kansas City, Kansas, was employed late in September, 1943, by Paul O. Kaiser, to take Miss Dunn's place as office clerk at the Kaiser plant. She was employed to work a regular week of 41½ hours at a straight salary of $30.00. From the date of employment until May 17, 1944, she worked 41½ hours per week, when her hours were reduced to 38½ per week. The plant operator kept no record of the hours worked by either Miss Dunn or by Miss Dale prior to May 17, 1944. Since then Miss Dale has been [fol. 28] punching the time clock and her time cards and the pay roll record show she works less than 40 hours per week.

VIII

50. J. William Howe, 1260 Pacific Street, Kansas City, Kansas, was hired as a night watchman on January 1, 1944, by Paul Kaiser to work seven 8-hour days at a weekly salary of $28.00 per week at the Kaiser plant. Mr. Howe was informed that he was to work 56 hours per week for a straight salary of $28.00 per week. Mr. Howe left the employment of the plant operator May 8, 1944. Mr. Howe's time cards show from one to three hours over 56 each week. Mr. Howe's instructions were that he was to work from 10:00 P. M. each night to 6: A. M. the next morning. Pay roll records for this employee indicated that he was paid on an hourly basis of 43½ cents for the first 40 hours, and an overtime basis of 65¼ cents for the next 16 hours, and that he worked exactly 56 hours each week. This employee was always paid exactly $28.00 per week.

IX

51. J. D. Herron, a refrigerator maintenance man, has the past three years including 1944, been engaged for a

period of three to six months through the spring, summer, and early fall periods each year, and has been paid out of petty cash and no pay roll record of his work or hours kept. Mr. Herron has been paid at the rate of $5.00 per day. He generally worked hours in excess of 40 in the workweek. In addition to maintaining the refrigeration equipment at the Kaiser plant, on some occasions Herron has served as a watchman on a Sunday for 4 or 5 hours. In 1944, Herron upon request of the Kaiser Co., refused to punch the time clock or make any record of his hours.

X

52. The plant operator has employed casual, occasional and fill-in employees for various types of labor, relief watchman and other duties, and paid such employees out of petty cash funds, evidenced only by petty cash vouchers, and failed to list, record, or indicate that such individuals were employees through the pay roll records of the plant operator or otherwise. Such work paid [fol. 29] for out of petty cash and not evidenced by any other plant operator records included: Boning beef head, loading and unloading coal, watchman and maintenance work, and miscellaneous labor. In other instances, the petty cash voucher simply indicated "labor" without dates or names or type of work indicated. On many occasions, the name of the occasional employee does not appear. On many occasions, the rate or method of pay at which he was employed is not clear, and the duties and hours worked by the employee are not shown.

XI

53. William Harvey, 1119 Pacific Street, Kansas City, Kansas, has been employed at the Kaiser plant off and on for the past 16 years, and became killing room foreman in August, 1940. Under his supervision are eight to ten employees. He is a working foreman, and works regularly right alongside his men, substituting where a man is late or absent and assisting where a "hand" is needed. As killing room foreman he was paid a straight salary of $55.00 per week until July, 1942, then $57.00 per week until July, 1943, after which time and until

he left the Kaiser plant, June 1, 1944, he received $60.00 a week. He was paid the same weekly salary whether he worked more or less than 40 hours a week. The employer has kept no record of his hours. He frequently works hours in excess of forty, and frequently works hours less than forty in the workweek. The employer claimed that this foreman was exempt from the provisions of the Fair Labor Standards Act under Section 13 (a) (1) thereof, and the Administrator conceded the exemption on a previous inspection, though his duties were similar.

XII

54. Peter Medvid, 509 Ohio Street, Kansas City, Kansas, has been employed at the Kaiser plant since May, 1941, as cooler foreman. On a previous inspection by the Administrator he was found to be exempt under Section 13 (a) (1) of the Act. Since about October, 1942, the bulk of the meat produced at the Kaiser plant has gone to supply Government requirements, and the amount of City business has fallen off so that Medvid, instead of [fol. 30] supervising the filling orders, etc., now does a major part of the work formerly done by those working under him. He regularly works 53 hours a week and has been paid a straight salary of $65.00 a week since August, 1941.

XIII

55. Alfred Askins, 2419 Lister Street, Kansas City, Missouri, has been an employee of the Rutherford Corp for the past 18 years. In about April of 1943, Askins was sent by that company to the Kaiser plant to work at that location. His duties are to look after the Rutherford Corp.'s interests, and to assure the Rutherford Corp. of a steady flow of boned beef, and to check the quality and weight of the meat. Most of his work is around the front end of the plant which includes the office, the cooler, and the shipping room. He occasionally cautions the beef boners about leaving too much meat on the bones and he is regularly in and out of the boning vestibule. He occasionally gives a hand where needed in work about the Kaiser plant. Mr. Askins is paid at the weekly rate of $55.00, which he understands covered his time in full; his average workweek

is 49 to 50 hours; he receives no extra compensation for hours worked in excess of forty in the workweek, nor is any record kept of his actual hours which fluctuate somewhat.

XIV

56. None of the following named Kaiser plant employees have ever belonged to any union while employed at the plant, not coming under the classifications covered by the applicable C.I.O. Union Contract referred to in III hereof: Robert G. Renn, Joseph T. Haskins, Viola T. Dunn, Mildred Dale, J. D. Herron, Pete Medvid, Alfred Askins, and regular watchmen.

57. At all times there have been employed at the Kaiser plant approximately 30 to 32 employees. In addition to th , the question of whether or not the 5 to 8 boners referred to in Section III hereof are also employees is to be determined by this suit.

58. The position of the Administrator with respect to said beef boning was first called to the attention of the plant operator on February 18, 1944, during the afore- [fol. 31] said second inspection, when Supervising Inspector John W. Johnson informed Paul G. Kaiser that the beef boners had not been paid overtime and that they were employees of the plant operator. Mr. Kaiser replied that the boners were not employees of the plant operator.

59. Meat packing and slaughtering are fifth on the War Manpower Commission list of thirty-five general categories of essential activities issued January 16, 1945.

60. As of January 23, 1945, the additional Defense Supplies Corporation subsidy referred to in paragraph 9, et seq. hereof, has not been granted nor denied to The Kaiser Co.

[(Addition to Paragraph 60)

On January 31, 1945, the Defense Supply Corporation allowed The Kaiser Co. the additional subsidy, and on February 5, 1945, it received a check for $11,397.68 for the month of January, 1945, and on March 5, 1945 it

received a check for $12,235.28 for the month of February, 1945.

(Approved)

(Signed) Henry J. Smith, R. L. Hecker.]

61. All of the boning is done under the constant inspection of a soldier detailed by the United States Army to determine compliance with Army boned meat specifications, and also under the general inspection of a lay inspector of the Livestock and Meats Branch of the War Food Administration (formerly Bureau of Animal Industry), such latter inspection being standard and required at all packing plants.

62. The definition "plant operator", as given in paragraph 2 hereof, shall not be construed as any waiver or withdrawal of plaintiff's contention that defendant Rutherford Corp. is an employer, as defined in the Act at all times on or after March 1, 1943, nor is said definition to be construed as a waiver or withdrawal of the defendants' denial of such contention of plaintiff.

63. The second inspection was not occasioned by any employee or boner complaint, but was occasioned by complaints made by competitors of the plant operator.

64. Defendants agree that they cannot meet the burden [fol. 32] of establishing that Alfred Askins (par. 55) and Peter Medvid (par. 54) are exempt under Section 13 (a) (1) of the Act. Defendants have expressed their intention of bringing these employees under the Act.

65. Attached hereto, marked Exhibits 6, 7 and 8, and made a part hereof, are copies of three letters mailed to defendants on the dates shown and received by defendants shortly thereafter.

66. It is further stipulated that further evidence may be introduced by any party on any issue in this cause.

Reid Williams, Henry J. Smith, Fidelity Building, Kansas City 6, Missouri, Attorneys for Plaintiff. E. R. Morrison, R. L. Hecker, 1701 Bryant Building, Kansas City 6, Missouri, Attorneys for Defendants.

EXHIBIT 1

Agreement

This Agreement made and entered into this 14th day of October 1942, by and between the George Kaiser Packing Company, operating a packing plant in Wyandotte County, Kansas, hereinafter referred to as Kaiser's and Jim Reed of Wyandotte County, Kansas, hereinafter referred to as Reed.

Witnesseth:

1. Kaiser's agree to furnish Reed all carcasses of beef for boning ordered from it by the U. S. Government whenever the U. S. Government shall require the boning of carcasses of beef ordered by it from Kaiser's.

2. Reed agrees to bone all of such carcasses of beef for Kaiser's and to complete the boning each day of all such carcasses furnished him; provided, however, that Reed [fol. 33] shall not be required to complete, during any one day, a greater quantity than Twenty Thousand (20,000) pounds of boneless beef, including the weight of tenderloins, but excluding the weight of Kidney Knobs, bones, waste and fat.

3. The boning of said carcasses, which Reed agrees to perform shall cover, in addition to actual boning the stripping of serous membranes from flanks, skirts and naval ends, including the removal or stripping of leaders, glands, skins, kidney knobs, large veins, blood stains and clots, and the removal of required fat, and shall also cover the cutting of said carcasses into boneless chucks, boneless ribs, boneless plates, boneless loins and boneless rounds.

4. Reed shall perform all work herein provided for as an independent contractor in the vestibule of the Kaiser Packing Plant. Kaiser's shall deliver said carcasses to Reed on the rails in said vestibule, and Kaiser's shall pick up the boned meat, tenderloins, Kidney Knobs, bones, fat products and waste, after the same have been sorted by Reed in barrels as hereinafter provided, Kaiser's shall also furnish and wash all barrels required for the sorting of said items.

5. Reed shall separately sort and place in separate barrels, so furnished him by Kaiser's, (a) all meat cuts including tenderloins, (b) all bones, (c) all fats and waste and (d) all kidney knobs.

6. All of the said work to be performed by Reed shall be performed in full compliance with all applicable Government Specifications and Regulations, from time to time applying to the work to be performed by him or to the said items or to any sales agreement or sales order with the U. S. Government, and all of said work shall be under and in accordance with the approval and directions of all Government inspectors.

7. It is expressly understood that Reed is an independent contractor; that he shall employ, compensate and be responsible for all of his employees; that his employees shall be under and subject to his sole direction and control and shall not be subject to the direction or control of Kaiser's; that Kaiser's shall not have the right to supervise or direct the work of Reed or any of his employees. [fol. 34] Reed shall furnish all of his own tools and equipment except said vestibule and except the boning tables now installed therein which shall be furnished by Kaiser's.

8. Reed agrees through the term of this Agreement to carry and maintain ample and adequate Workmen's Compensation and Employer's Liability Insurance covering all of his employees, and to furnish Kaiser's certificates of such insurance. Reed agrees to and shall protect, indemnify, defend and save harmless Kaiser's from and against any and all injuries to any and all persons and from and against any and all damages to any and all property caused by or claimed to have been caused by him or any of his employees.

9. Reed agrees for himself and his employees that he shall not at any time interfere with the convenient ingress and egress of Kaiser's and its employees to its plant through said vestibule and shall not obstruct Kaiser's weighing facilities in said vestibule or the carrying of any of its products through said vestibule between its dock and any other portion of its packing plant.

10. It is agreed between the parties that the contract rate for the said work to be performed by Reed shall be computed at the rate of Forty (40¢) cents per hundred pounds for all boneless beef, including the weight of tenderloins, but excluding the weight of Kidney knobs, bones, waste and fat, it being understood and agreed that said contract rate of 40¢ per hundred pounds for boneless beef including weight of tenderloins covers the compensation for the entire work to be performed by Reed.

11 The boneless beef and tenderloins placed in separate barrels by Reed as above provided shall be sorted by Kaiser's. It is understood that the boneless beef will be packed by Kaiser's in separate boxes each containing one hundred (100) pounds of boneless beef. Such boxes will be weighed by Kaiser's empty and again after packing and the weight of the box will be deducted from the total weight to show the weight of the meat contained therein. Kaiser's shall keep a record of all such boxes and the weight of meat therein and a record of all the weights of all tenderloins and shall furnish Reed with a daily copy [fol. 35] of the same. Reed shall have the right personally or through any of his employees to check the weights of all such boneless beef and tenderloins. Settlements for the contract price due Reed shall be made up on a weekly basis. Settlement periods shall run from and including Thursday of each week through Wednesday of the following week and payment on such settlements shall be made by Kaiser's within two days after such settlement.

12. Reed agrees that all of his employees shall be affiliated with the C.I.O. Union and that, if requested by Kaiser's or said C.I.O. Union, he will take over from Kaiser's the employment, as his own employee, of Sam Dolinar now a boner in the employ of Kaiser's.

13. Neither party shall be liable to the other for failures occasioned by breakdowns, strikes, acts of God or other unavoidable contingencies.

14. This Agreement shall commence October 15, 1942 and shall continue in full force and effect for the duration of hostilities in which the U. S. Government is involved but shall be subject to termination at any time by either

party upon two weeks advance notice delivered to the other.

In Witness Whereof the parties hereto have caused this Agreement to be duly executed the day and year first above written.

The George Kaiser Packing Company, by Paul O. Kaiser, President. Jim Reed. L. Peterson.

Attest: J. S. Liehrman, Secretary.
Witness: Wm. Harvey.

Memorandum

Paragraph No. 1 of Agreement dated October 14, 1942, between The George Kaiser Packing Company and Jim Reed, is hereby changed and amended to read as follows:

1. Kaiser's agrees to furnish Reed all carcasses of beef for boning ordered from it by the U. S. Government when-
[fol. 36] ever the U. S. Government shall require the boning of such carcasses of beef and further agrees to furnish Reed all carcasses of beef for boning ordered from it by canning organizations who are working for the U. S. Government or on Government Contracts whenever such Canning organizations shall require the boning of said carcasses of beef.

The George Kaiser Packing Company, by Paul O. Kaiser, Pres. Jim Reed. Leonard Peterson.

Dated 10-14-42.

Exhibit 2

Agreement

This Agreement Made and entered into this 28th day of October, 1944, by and between The George Kaiser Packing Company, a corporation, hereinafter referred to as "Kaiser's", and Frank Hooper doing business as The Frank Hooper Boning Company, hereinafter referred to as "Hooper".

Witnesseth:

1. Kaiser hereby lets to Hooper and Hooper hires and takes from Kaiser a certain room, known as the Boning

Room, together with the rails, tables and other fixtures now therein, in the Kaiser plant at 81 North First Street, Kansas City, Kansas, the same being a room approximately 30 x 30, and located between the cooler room and the dock-storeroom from November 1, 1944, for so long as this contract shall be in force, at and for a monthly rental of One Hundred Dollars ($100.00), payable monthly in advance. Kaiser agrees to furnish heat, light and water in said room. Kaiser reserves and shall have the right of passage through the room and the use of the rail from the cooler room to the dock storeroom and the rail scale therein; provided, however, that such passage and use does not unreasonably interfere with Hooper's use and occupancy. Hooper agrees to use said premises solely for the purpose of conducting therein a beef boning business and for no other purpose.

2. Kaiser agrees to furnish Hooper all carcasses of beef [fol. 37] for boning ordered from it by the U. S. Government whenever the U. S. Government shall require boned beef from Kaiser, and all carcasses ordered or purchased by processors or canners from Kaiser which they require to be boned, and Hooper agrees to bone all of such carcasses of beef for Kaiser and to complete the boning each day of all such carcasses furnished him; provided, however, that Hooper shall not be required to complete, during any one day, a greater quantity than forty thousand (40,000) pounds of boneless beef, including the weight of tenderloins, but excluding the weight of kidney knobs, bones, waste and fat. Hooper shall not be required to bone exclusively for Kaiser but may accept such other contracts as it may from time to time desire, provided Hooper bones all carcasses furnished by Kaiser as herein provided.

3. The boning of said carcasses, which Hooper agrees to perform, shall cover, in addition to actual boning, the stripping of serous membranes from flanks, skirts and naval ends, including the removal or stripping of leaders, glands, skins, kidney knobs, large veins, blood stains and clots, and the removal of required fat, and shall also cover the cutting of said carcasses into boneless chucks, boneless ribs, boneless plates, boneless loins and boneless rounds. All of the said work to be performed by Hooper shall be

performed in full compliance with all applicable Government specifications and regulations, from time to time applying to the work to be performed by him or to the said items or to any sales agreement or sales order with the U. S. Government, and all of said work shall be under and in accordance with the approval and directions of all Government Inspectors.

Kaiser shall deliver all carcasses to be boned by Hooper to Hooper on the rails in the space hereinbefore let to Hooper, and Kaiser shall pick up the boned meat, tenderloins, kidney knobs, bones, fat products and waste, after the same have been sorted by Hooper in barrels, as hereinafter provided. Kaiser shall also furnish and wash all barrels required for the sorting of said items. Hooper shall separately sort and place in separate barrels, so furnished it by Kaiser, all meat cuts, including tenderloins, all bones, all fats and waste, and all kidney knobs.

[fol. 38] 4. Hooper shall employ, compensate and be responsible for all such employees as it shall need to perform the aforesaid boning; its employees shall be under and subject to its sole direction and control and shall not be subject to the direction or control of Kaiser; Kaiser shall not have the right to supervise, direct or control the work of Hooper or any of its employees or the manner in which the work is performed; but Hooper shall be responsible to Kaiser only for the results of work done under this contract; Hooper shall furnish all of its own tools and equipment.

5. Hooper agrees to carry and maintain ample and adequate Workmen's Compensation and Employer's Liability Insurance covering all of its employees, and to furnish Kaiser certificates of such insurance; Hooper agrees to and shall protect, indemnify, defend and save harmless Kaiser from and against any and all injuries to any and all persons and from and against any and all damages to any and all property caused by or claimed to have been caused by it or any of its employees. Hooper shall comply with all city, state and federal laws, regulations and requirements, and shall protect, indemnify and save harmless Kaiser from and against any and all claims that may be made against it for its failure or neglect to so do.

6. Hooper agrees for itself and its employees that it

shall not at any time interfere with the convenient ingress and egress of Kaiser and its employees to its plant through their leased space, and shall not obstruct Kaiser's use of the rail and rail scale above referred to, or the carrying of any of its products through the leased space between its dock.

7. It is agreed between the parties that the contract rate for the said work to be performed by Hooper shall be computed at the rate of forty-five (45¢) cents per hundred pounds for all boneless beef, including the weight of tenderloins, but excluding the weight of kidney knobs, bones, waste and fat,—*it being understood and agreed that said* contract rate of 45¢ per hundred pounds for boneless beef, including weight of tenderloins, covers the compensation for the entire work to be performed by Hooper. If the government specifications for boned beef are changed, this rate per hundred pounds shall be adjusted by mutual agreement.

[fols. 39-40] 8. All carcasses shall be weighed before delivery to Hooper and the boned beef, bones, waste, fat, etc., shall be weighed on being returned to Kaiser, the total weight of the latter to equal the former. Kaiser shall keep a record of all weights and shall furnish Hooper with a daily copy of the same. Hooper shall have the right personally or through any of its employees to check the weights.

9. Settlements for the contract price due Hooper shall be made up on a weekly basis. Settlement periods shall run from and including Thursday of each week through Wednesday of the following week and payment on such settlement shall be made by Kaiser within two days after such settlement.

10. Hooper agrees that all of its employees shall be affiliated with the C.I.O. Union.

11. Neither party shall be liable to the other for failures occasioned by breakdowns, strikes, acts of God or other unavoidable contingencies.

12. This Agreement shall be effective from and after October 1, 1944, and shall continue in full force and effect for one year, but shall be subject to termination

at any time by either party upon two weeks advance notice delivered to the other. This agreement may be assigned by either party without notice.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed the day and year first above written.

The George Kaiser Packing Company, by Paul O. Kaiser, President. The Frank Hooper Boning Company, by Frank Hooper.

Attest: J. H. Edmondson, Secretary.

(Here follow 2 Photolithographs, side folios 41-42, 43-44)

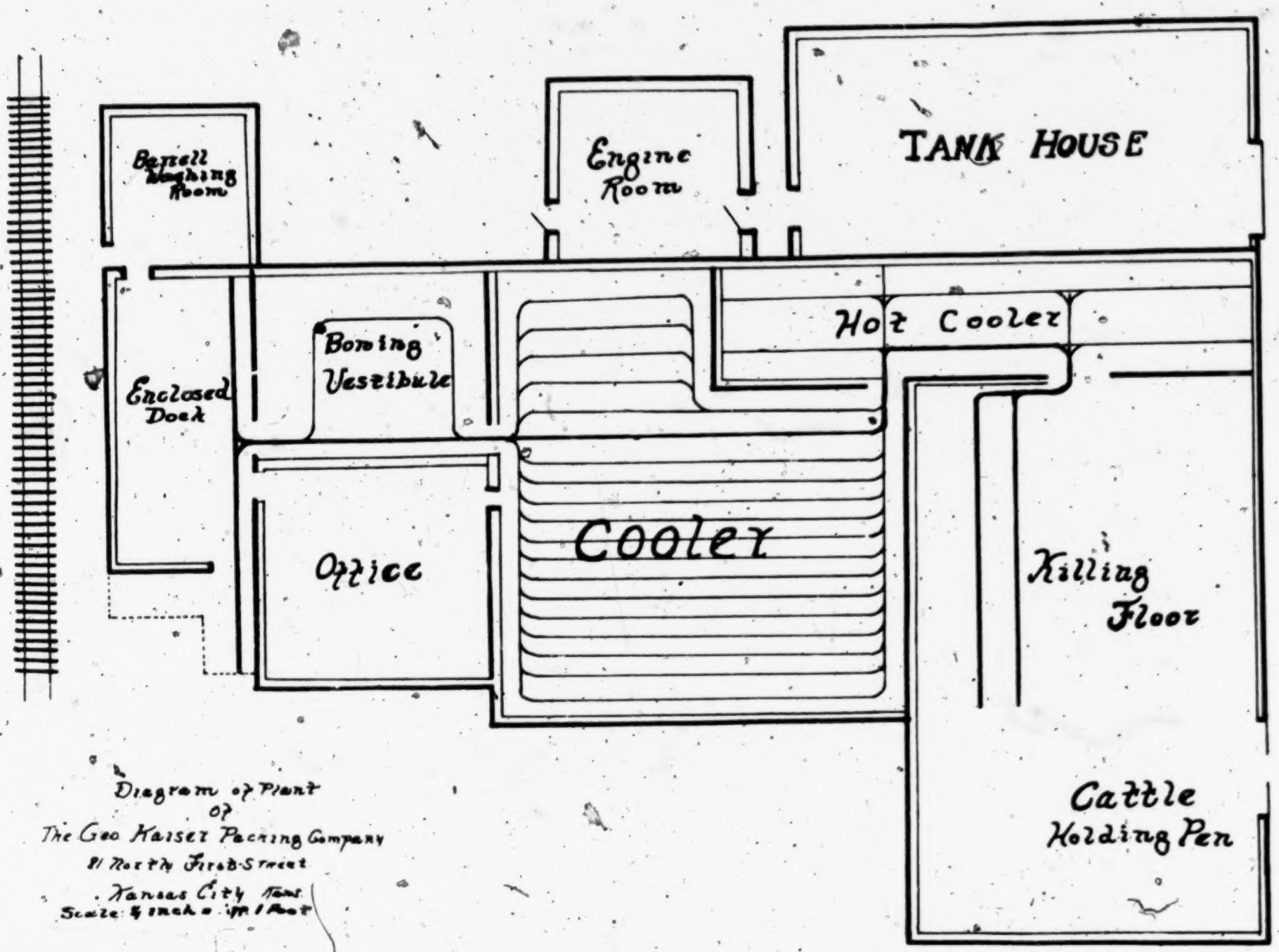
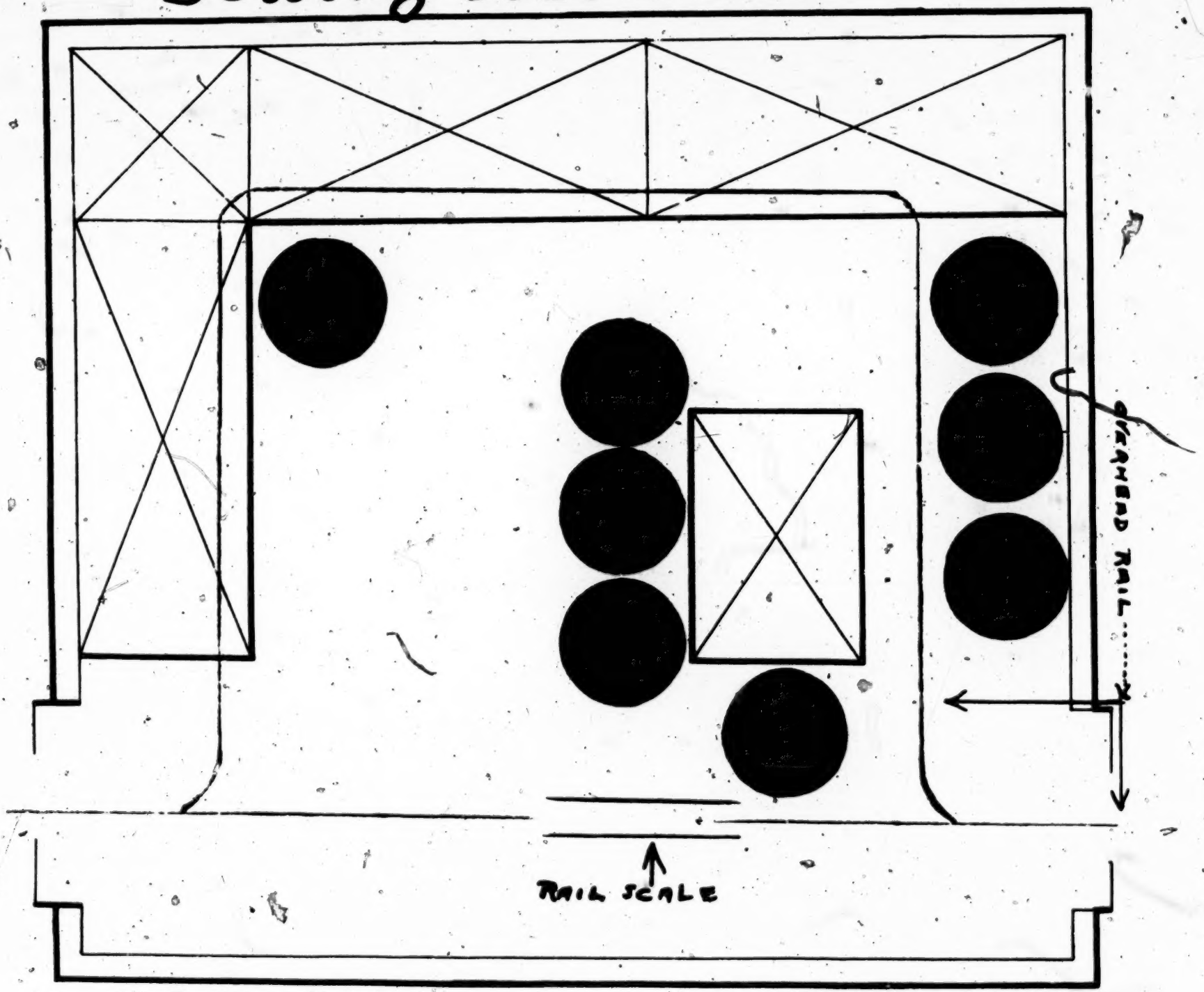


Diagram of Plant
of
The Geo Kaiser Packing Company
81 North First Street
Kansas City Kans.
Scale ½ inch = 1 ft 1 foot

EXHIBIT 3.

EXHIBIT 4.

Boring Vestibule



THE GEO. KAISER PACKING COMPANY
81 North First Street
Kansas City

Scale 1 inch = 1 Foot

[fol. 45] EXHIBIT 5

Lease Agreement

This Agreement made and entered into this 1st day of July, 1943, by and between the George Kaiser Packing Company, a Missouri Corporation, hereinafter referred to as Lessor, and Rutherford Food Corporation, a Missouri corporation, hereinafter referred to as Lessee,

Witnesseth that:

Lessor does hereby lease and let to the Lessee and the Lessee does hereby take and hire from the Lessor the following described premises and properties to-wit:

Lots 186, 187, 188, 190 and 192 on Wood Street (now first Street), Kansas City, Kansas, of the consolidated City of Kansas City, Kansas, together with the buildings and improvements thereon, and all machinery, equipment, cooler, belts, motors, power plants, trucks, automobiles and tools now located in, upon or about said premises, or used in connection with the operation of a slaughter house thereon, being the entire physical properties and plant of The George Kaiser Packing Company, for the term of one year from the date hereof, in accordance with the following terms and conditions:

1. Lessee shall pay to Lessor as rent for the above described premises and property the sum of Fifteen Hundred Dollars ($1500.00) per month, payable monthly in advance, the first month's rent to become due and payable upon the execution of this agreement.

2. Lessee covenants and agrees to take good care of the premises and property hereby leased and to use the property in a careful and prudent manner; that it will pay for all damages done to the premises and property resulting from negligence or carelessness of those who may come upon the leased premises at the invitation, either express or implied, of the Lessee, or which may be caused by Lessee, its agents, servants or employees.

3. Lessee agrees that it will not conduct or allow on said premises and property any business contrary to the laws of the United States of America, the laws of the [fol. 46] State of Kansas, or the ordinances of the City

of Kansas City, Kansas; that it will not permit the use of said premises for illegal or improper purposes, or any purpose calculated to injure or deface the same, or to injure the reputation or the credit of the premises, or use said premises and property for any purpose, to keep anything therein, that shall or may invalidate any fire insurance policy or policies held thereon by Lessor, or that may increase insurance rates on said premises and property.

4. In case, during the term of this lease, the leased premises become untenantable by reason of fire, providence or other casualty, or personal property is so damaged as to be unusable for the purpose of conducting a slaughter house, the rent shall abate in proportion with proportionate refund of any prepayment covering the time from said occurrence until Lessor restores the premises and property; provided that if the premises and property, or any part thereof, be so injured as in the opinion of the Lessor possession of the leased premises and property is needed for demolition or reconstruction, Lessor may, by written notice to Lessee, terminate the term of this lease; provided, always, however, that if the injury to or destruction of, said premises and property shall occur by reason of or consent upon any negligent act or omission on the part of the Lessee, then Lessor shall not be required to repair the same and the obligation to pay rent shall not abate or cease during the period such premises continue untenantable, in whole or in part.

5. Lessor shall make all repairs to the roof and exterior walls of the premises at its own cost and expense; Lessee shall keep the interior of the premises and the personal property therein in good repair at its own cost and expense. Lessee may, from time to time, alter or add to the premises and replace or add additional property and equipment at its own cost and expense. Upon the termination of this lease or surrender of the premises and property, Lessee may, at its option, remove and keep any new property and equipment put in by it provided it leave the premises and property in reasonable operating condition.

6. At the termination of this lease, whether by lapse

of time or otherwise, Lessee shall surrender to Lessor [fol. 47] quiet and peaceable possession of the premises hereby let in as good condition as the same now are, ordinary wear and tear, damage or destruction by fire or other Providential means excepted, unless otherwise herein provided.

7. Upon breach of any of the foregoing covenants and agreements, Lessor shall have the right to reenter upon the premises hereby let and take possession of the premises and property above described immediately upon any such breach. In such event, this lease shall, at the option of the Lessor, terminate, and Lessor shall have the same legal rights and remedies as it would have had if the terms hereof had expired by lapse of time. Each day of the continued breach of any of the foregoing covenants or agreements shall be a separate and distinct breach, and no waiver of any breach or breaches of any of the covenants or agreements shall operate as a waiver of any subsequent breach of the same or any other covenant or agreement.

8. All covenants, agreements and conditions herein contained shall run with the premises and property hereby let and bind the successors and assigns of both Lessor and Lessee.

9. This lease and agreement shall not be binding upon either party hereto should Lessor be unable to get the consent and approval of the Reconstruction Finance Corporation to the letting hereby affected, or should Lessee be unable to obtain from the proper authorities the necessary permits, etc., to enable it to operate the premises as a slaughter house, or should it be unable to qualify and obtain permission to do business in the State of Kansas; both Lessor and Lessee agree to co-operate and use reasonable diligence in obtaining such consent, permits and authority.

10. Lessor expressly consents that Lessee may during the term of this agreement, in the conduct of the premises and property as a slaughter house, use the name "The George Kaiser Packing Company Division of Rutherford Food Corporation," or any similar designation using the name "Kaiser", but Lessee shall not obtain credit in the name of the Lessor, or obligate it in any manner, and Lessee shall protect and indemnify Lessor from any and

[fol. 48] all claims and demands arising from Lessee's use of the premises and property as a slaughter house.

11. During the continuance of the present war and for six months thereafter Lessee shall have the right at its option to continue this agreement in force and effect for one or more additional periods of six months, provided that it give notice to Lessor in writing of its intention to so do at least thirty (30) days before the expiration of the original term, or any such extended term.

Executed at Kansas City, Missouri, the day and year first above written.

The George Kaiser Packing Company, By Paul O. Kaiser, President. Rutherford Food Corporation, By Geo. Van Voorst, Treas.

Attest: J. H. Edmondson, Secretary.
Attest: H. N. Rutherford, Secretary.

EXHIBIT 6.

Department of Labor
Office of the Solicitor
3000 Fidelity Building

Kansas City 6, Missouri, May 2, 1944.

KCL:HJS:LBB

Mr. Paul O. Kaiser, President, George Kaiser Packing Co., 81 North First Street, Kansas City, Kansas.

My dear Mr. Kaiser: A recently conducted inspection of your plant by the Wage and Hour and Public Contracts Divisions of the Department of Labor disclosed that your company has not been in compliance with the requirements of the Fair Labor Standards Act. Serious and recurrent record keeping and overtime pay violations were disclosed by the inspection, including, but not by way of limitation, the failure to pay proper overtime compensation to a number of Beef Boners employed by you.

[fol. 49] Before taking any action against your company, it is our desire to notify you of our findings and to invite you to meet with us for the purpose of discussing the nature

of said violations. Please let us know within the next few days as to the date upon which we may expect a visit from you at this office.

Very truly yours, Reid Williams, Acting Regional Attorney.

EXHIBIT 7.

Department of Labor
Office of the Solicitor
3000 Fidelity Building

Kansas City 6, Missouri, May 2, 1944.

KCL:HJS:LBB

Mr. H. T. Rutherford, President, Rutherford Food Corporation, 225 Grand Avenue, Kansas City, Missouri.

Dear Mr. Rutherford: A recent inspection of the George Kaiser Packing Company, in which your firm is financially interested, by the Wage and Hour and Public Contracts Divisions of the Department of Labor disclosed a number of serious violations of the Fair Labor Standards Act. Included in said violations were serious and recurrent record keeping violations and the failure to pay proper overtime compensation to a large number of employees including, but not by way of limitation, a considerable number of Beef Boners.

Before taking any action against your company, it is our desire to notify you of our findings and to invite you to meet with us for the purpose of discussing the nature of said violations. Please let us know within the next few days as to the date upon which we may expect a visit from you at this office.

Very truly yours, Reid Williams, Acting Regional Attorney.

[fol. 50] EXHIBIT 8.

National War Labor Board
Regional War Labor Board VII
2100 Fidelity Building

Kansas City 6, Missouri, May 1, 1944.

Kaiser Packing Company, 81 North First Street, Kansas City, Kansas.

Re: Kaiser Packing Company,
Kansas City, Kansas, 60-7-834

Gentlemen: An inspection by an Inspector of the Wage and Hour Division of the Department of Labor, reflects that you are in apparent violation of the Wage Stabilization Act, orders and regulations promulgated thereunder.

On the basis of the facts set out by the inspector, it is our opinion that the individuals in the Boning Department are not independent contractors but employees of your company.

Before enforcement procedure is started, we will be glad to give you an opportunity to state your position in respect to the violations which appear.

If you desire such a conference, please advise us within the next ten days.

Very truly yours, Nat W. Benton, Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEPOSITIONS OF THELMA ANDERSON AND FRANK HOOPER—Filed January 31, 1945

The examinations of witnesses, taken between the hours of eight o'clock a. m. and six o'clock p. m. of Wednesday, January 24, 1945 and Thursday, January 25, 1945, at the law offices of Messrs. Morrison, Nugent, Berger and Johns, 1701 Bryant Building, in the City of Kansas City, in the County of Jackson and State of Missouri, before me, Betty Good, of Miles and Behrens, Shorthand Reporters, a Notary Public in and for the County of Jackson [fol. 51] and State of Missouri, on behalf of the plaintiff, pursuant to the stipulation hereinafter set out.

Appearances: For the Plaintiff: Mr. H. J. Smith, Attorney, Wage & Hour Division, Department of Labor, 3000 Fidelity Building, Kansas City, Missouri. For the Defendants: Messrs. Morrison, Nugent, Berger & Johns, 1701 Bryant Building, Kansas City, Missouri, By Messrs. E. R. Morrison and Robert L. Hecker.

STIPULATION

Before the taking of the within depositions, the parties, by their counsel, stipulate that the same may be taken at this time in shorthand and thereafter typed, the reading and signing of said depositions being expressly waived by consent of counsel and the witnesses, and regularly filed in the case, with the same force and effect as if notice had been given, subject to objections as to competency, relevancy and materiality.

THELMA ANDERSON, of lawful age, being produced, sworn and examined on behalf of the plaintiff, deposeth and saith:

Direct examination.

By Mr. Smith:

Q. State your name.
A. Thelma Anderson.
Q. Who is your employer?
A. Paul Kaiser.
Q. Is that the George Kaiser Packing Company?
A. Yes.
Q. For what period of time have you been employed by the Kaiser Packing Company?
A. I don't know the exact date but I think it was the last of July or the first part of August sometime.
Q. Was that in 1944?
A. Yes, just this last year.
Q. In what part of the Kaiser Packing Company plant do you work.
A. I work in the part where they bone beef.
Q. Is that known as the boning vestibule?
[fol. 52] A. I imagine that is what you would call it.

Q. Is all of your work for the Kaiser Packing Company performed in that vestibule.

A. Yes, every bit.

Q. In what part of the vestibule do you perform your work?

A. Well, not quite in the middle of it.

Q. Is that near the middle of the vestibule?

A. Close to the middle of it, the center of it.

Q. Is that at a table?

A. I have a table.

Q. Towards the middle of the vestibule?

A. Yes.

Q. What do you call the work that you perform?

A. I call it beef trimming.

Q. Do boners also work in the boning vestibule, beef boners?

A. Oh, yes.

Q. About how many through the time that you have worked for the company, on an average, work at one time?

A. Well, I will tell you, I don't know. That is hard to figure out.

Q. Are there about five or six?

A. Five or six would be the average. Sometimes it will get up to seven but they don't do that very often.

Q. Explain, if you will, just what happens in the boning vestibule, starting with the time the boners first start work on the carcass. Just what do the boners do and just what operations do you perform?

A. The head man, the man on the front end, he ribs the cattle and marks them and takes off the forequarter and pushes the hind quarter on down the rail. I don't know just exactly what you would call the job he performs. He takes the bone off of the neck and then he unjoints the chuck and throws it over on the table and he takes off the clod and throws it to me. I trim it.

Q. Do the boners perform any work other than removing meat from bones?

A. I haven't seen them do anything.

Q. I didn't understand you.

A. I said not that I know of.

Q. That is their major work?

[fol. 53] A. That is their work, beef boning.

Q. When they have removed meat from bones, what do they do with the chunks of meat?

A. If it has to be trimmed, they throw it to me. If it doesn't, they throw it in the barrel.

Q. What proportions of the meat require trimming?

A. I couldn't tell you approximately. I could take you down there and show you but I couldn't tell you right now.

Q. Does most of the meat require trimming?

A. Yes.

Q. What do the boners do with the meat that doesn't require trimming?

A. They throw it into the cans.

Q. That is, into the metal barrels, is that correct?

A. Yes.

Q. That meat which requires trimming is thrown onto your table, is that correct?

A. Yes, sir.

Q. You proceed to trim it?

A. Yes, sir.

Q. After you have trimmed it, what do you do with the meat, with the beef?

A. I throw it in the cans.

Q. Is that the same can into which the boners throw the meat that doesn't require trimming?

A. Yes.

Q. What do you do with the foreign material that you separate from the meat?

A. I throw it in what we call a slack barrel.

Q. That is for waste products, is that correct?

A. Yes.

Q. Describe in detail just what trimming is. What sort of waste materials do you remove from the beef?

A. I remove blood vessels, blood clots, fat, heavy tissue, skin, bone, little particles of bone. They are more like gristle.

Q. Do you remove serous membranes from flanks, skirts, and navel ends as a part of your trimming?

A. Yes, I guess that is what you would call it.

Q. Explain, what operations you perform with respect to kidney knobs.

A. I don't know what they call a kidney knob.

[fol. 54] Q. Do you bone kidneys?

A. Yes.

Q. Explain what boning kidneys consists of.

A. Well, on some kidneys, they have good fat and on others it isn't good fat. If the fat is any good, you cut off the blood and the tissue and throw it into the barrel of waste and then you save the good fat. If it isn't any good, you open it up and take the kidney out and throw the fat away.

Q. Are there any separate barrels for fat?

A. Oh, yes, one for good fat and one for fat that isn't any good.

Q. Explain what portion of the beef, if any, goes into other barrels than the regular beef barrels. Does all of the beef which you bone that is not fat or waste go into the barrels of boned beef?

A. No.

Q. What parts do not and where do they go?

A. The kidneys and the tenderloins.

Q. Where do those parts go?

A. They go into another barrel. The kidneys go in one barrel and the tenderloins in another.

Q. What tools do you use in trimming?

A. I use a knife, a hook and a steel.

Q. Are the hooks and the steels the same as used by the boners?

A. Yes, sir.

Q. What is the name of the knife you use?

A. I use a Russell trimming knife.

Q. Do some boners also use trimming knives?

A. Some boners prefer them to the boning knives.

Q. And those boners who do use a knife like yourself, is that correct?

A. Yes, sir.

Q. In what way does a boning knife differ from a trimming knife?

A. A boning knife is straight and a trimming knife is curved.

Q. Are they both about the same size?

A. You can get them different sizes, I believe. I always get the six-inch trimming knife.

[fol. 55] Q. Who owns your hand tools, your knife and steel and hook?

A. I own them.

Q. You mean personally?

A. Personally, I own them.

Q. Do you use any other tools in the performance of your duties?

A. No.

Q. Prior to the first of this year, have you done boning in the boning vestibule and if so, explain how you happened to do boning.

A. No, I don't think I have.

Q. On occasion, have you asked the boners to pass you a certain cut of beef to bone?

A. Yes, if I have run out of work.

Q. Before the first of the year, how often did that happen?

A. Oh, I don't know exactly, maybe some days I would have plenty to do and maybe other days, why, it seemed like there wouldn't be as many there and I would be more caught up in my work and didn't want to stand there because it was chilly, and I would ask them to hand me a brisket or something.

Q. Did you do that as often as several times a week?

A. Oh, yes.

Q. Beginning about two weeks ago, were there new Government regulations on trimming?

A. Yes.

Q. Explain just briefly in a general way what you have to do now that you didn't before.

A. We just practically have to do about twice as much.

Q. Does that mean removing more membranes and skins?

A. More membranes and more glands and more fat, more skin, tissue and everything.

Q. Has the result of that been that you have gotten a little bit back on the trimming work on occasion?

A. Yes, it piles up.

Q. What do the boners do when you can't handle the pieces of meat as they come to you? Where are those pieces of meat placed?

A. They put them in a barrel. They have the boy that [fol. 56] works there—they holler to him and have him bring them a barrel and they put it in there and after they go home I get them.

Q. On such occasions, you stay later in the day than the boners to do that work, is that correct?

A. Yes.

Q. Have you ever received any pay for work from the boners or anyone else besides the Kaiser Packing Company?

A. You mean since I have worked there?

Q. That is correct.

A. No, I haven't.

Q. What time do you go to work in the morning?

A. Seven o'clock.

Q. Is that the same time that the boners start to work?

A. Yes.

Q. Do you ever quit before the boners have finished for the day?

A. No, I haven't.

Q. Do you ordinarily work as long as or later than the boners?

A. I always work as long as they do and mostly later.

Q. Do you take a lunch or rest period at the same time that the boners do?

A. Oh, yes, because if I didn't, when I would come back I would be piled up, if I didn't go at the same time they did. And if I didn't go at the same time they do, why, I wouldn't have anything to do while they were gone. I would now but I just got into the habit of doing it that way and I kept it up.

Q. Except for this extra work where you have to stay and trim after the boners leave, your hours are exactly the same as theirs, is that right?

A. My hours are the same as theirs except after they leave some times I work two or three hours alone.

Q. What is the rate of pay at which you are employed?

A. Seventy-five cents an hour.

Q. Do you receive overtime for hours over forty?

A. Yes.

Q. Per work week.

A. Yes.

Q. Have you on occasion worked hours over 40 in the work week?

[fol. 57] A. Oh, yes, there have been a few times, especially here lately.

Q. Is a part of your work the removal of leaders, glands, skin, large veins, blood stains and clots?

A. Yes, sir.

Q. That is also a part of trimming as that term is known?

A. Yes.

Q. Have your rate of pay and hours of work been the same throughout the period that you have worked at the Kaiser plant?

A. Oh, yes. He hired me at seventy-five cents an hour and that is what he is paying me now.

Q. You worked about the same hours and the same days as when you first came?

A. Yes.

Q. When you said you were paid overtime for hours over forty, you meant at time and one-half your regular rate, is that correct?

A. Oh, yes.

Mr. Smith: That is all.

Mr. Morrison: No questions. Is it all right to waive the signature?

Mr. Smith: Yes.

Mr. Hecker: Mrs. Anderson, do you agree to waive the reading and signing of the deposition?

The Witness: Yes, that is all right with me.

(Witness excused.)

By agreement of the parties and the witness, the signature is waived.

Betty Good, Notary Public in and for Jackson County, Missouri. (Notary Public Seal)

Frank Hooper, of lawful age, being produced, sworn and examined on behalf of the plaintiff, deposeth and saith:

[fol. 58] Direct-examination.

By Mr. Smith:

Q. State your full name.

A. Frank Hooper.

Q. And your residence?
A. 5109 Thompson.
Q. Where do you work?
A. Kaiser Packing Company.
Q. For what period of time have you worked there?
A. Since December 13, 1943.
Q. What type of work have you done in that period at the Kaiser plant?
A. Boned beef.
Q. Has that been your work throughout the period of your working there?
A. That is all I have ever done there.
Q. In the month of May, 1944, did you enter into some kind of an arrangement with Paul O. Kaiser, with reference to the boning of beef?
A. Well, there was an arrangement. I just took over where the other man left.
Q. Had a man by the name of Otto Schindel been operating the beef boning?
A. That is right.
Q. Before that time?
A. Yes.
Q. You say you took over in his place, is that correct?
A. That is right.
Q. Under what arrangement did you take over? What was the understanding?
A. Just the same way he had it.
Q. What did that amount to with reference to what you were to do and the payment to be received?
A. Well, just to bone the beef at 45 cents a hundred was the only arrangement I had then at that time.
Q. Was that 45 cents per hundred of boned beef?
A. That is right.
Q. Was another boner associated with you in this arrangement?
A. That is right.
Q. What was his name?
[fol. 59] A. Oliver Deer.
Q. State whether or not Mr. Deer, in the month of October, 1944, got into certain personal difficulties that caused him to leave the job temporarily?
A. He did.

Q. While he was gone, did you have conversations with Paul O. Kaiser relative to the beef boning?

A. I did.

Q. State just what conversations were had and what was said.

A. That would be a hard thing for a man to say.

Q. Was the question of your continuing with the beef boning discussed?

A. Sure.

Q. Did Mr. Kaiser ask you to enter into an arrangement by yourself with the Kaiser Company?

A. That is right.

Q. About the beef boning?

A. Yes.

Q. Did he ask you to sign a written contract about the beef boning?

A. Well, I think he did, yes. I am pretty sure he did.

Q. When he mentioned this written contract, did he state that there would be any difference in the terms or the arrangements of the way you had been working?

A. Well, we was trying to figure out some rather different arrangements, yes.

Q. What was said about changes in the arrangement?

A. Well, I was to pay rent and was supposed to figure out some way—changing it around where the rent would be taken care of and it never was done.

Q. What rent was suggested that you should pay?

A. $100.00 a month.

Q. Was that your suggestion or Mr. Kaiser's or someone's else?

A. Mr. Kaiser's. It wasn't mine.

Q. Did you state an objection to that rental?

A. No.

Q. You have stated that that rental was to be taken care of. Will you explain what you mean by that?

A. Well, either by paying for kidneys and fat or [fol. 60] something like that or some other way around, to give me more weight.

Q. You have never received any payment for other products of the boning vestibule than the boned beef, is that correct?

A. That is right.

Mr. Hecker: Correction there. Do you count the tenderloin?

A. Well, that is boned beef; that is beef.

By Mr. Smith:

Q. You understood that the rent was to be offset by the payment for fat or other waste products?

A. Part of it, anyway.

Q. Who made the suggestion that it might be taken care of in that way?

A. Well, I don't know unless it would be Paul.

Q. Do you recall that he made some such suggestion.

A. Yes, we had been arguing back and forth down there for two or three months about first one thing and then another.

Q. Did you sign a written contract in the latter part of October, 1944?

A. I did.

Q. Where was that contract signed, at what place?

A. I signed it at Mr. Campbell's office.

Q. Do you know who drew up the written contract that you signed?

A. I do not.

Q. Did you have anything to do with the language used in the contract?

A. No.

Q. Did you have anything to do with the designation, "The Frank Hooper Boning Company", that name appearing at the end of the contract?

A. Well, that is the name I give it, yes.

Q. You gave that name to Mr. Kaiser, is that correct?

A. Yes.

Q. Did you sign the written contract in the form that it was first presented to you by Mr. Campbell?

A. That is right.

Q. Was the rate for boning beef increased or changed in any way at the time you started on the written contract?

[fol. 61] A. No change.

Q. Was there any other change under the written contract from the former oral arrangement except for the $100.00 rent?

A. That was the only change.

Q. Have you paid any rent or has any rent been paid for you since the entering into of this written contract?

A. No, there was not.

Q. Have you been asked by Paul Kaiser or anybody else in his behalf for rent?

A. No.

Q. Has any rent been deducted from boning money paid to you?

A. There has not.

Q. Have you had any discussion with Mr. Kaiser or anybody else representing him about the rent since November 1, 1944?

A. I have not.

Q. What is your reason for not having paid the rent?

A. Well, how would I come out if I paid the rent? Figure it out for yourself.

Q. State whether or not the earnings of the boners, if you paid the rent, would be just $100.00 less per month than they were before the rent, before the written contract for a similar month.

A. Wait a minute; let's get this straight, now. I say—say what you said over again. (Question read.)

That is right. It would be $100.00 less if I paid it.

Q. Has any adjustment upon the rate of payment for boned beef or any other kind of adjustment been made to compensate you, to offset the rent money?

A. No.

Q. Have you requested such adjustment or have you requested a greater rate for the boned beef?

A. I have talked about it, yes, sir.

Q. Have you talked with Mr. Kaiser?

A. Yes.

Q. What have been his replies to your request?

A. Always been waiting and see if they are going to do with this new government business or new contract. I don't know what it is all about.

[fol. 62] Q. Within the last few weeks have there been put into effect new government requirements on trimming?

A. That is right.

Q. Just state the effect of those requirements on the boning operations.

A. Well, it is a whole lot more severe trim is all it is,

and you can get that information from the government. They have different forms, 305 and 305-A. You can get them forms and read them themselves. I can't tell you what they are. I have read them but I can't remember them.

Q. Is the effect of the new requirements that more of the skin and veins, etc., must be taken from the meat?

A. That is right.

Q. Did those requirements go into effect in early January, 1945?

A. Yes.

Q. Since that time, have you and the other boners been able to bone as much meat as you did before?

A. We have not.

Q. Do you have a copy of the written contract that you signed for the boning?

A. I do not.

Mr. Hecker: You mean with him?

A. I don't have it any place.

By Mr. Smith:

Q. You have never received a copy of the contract, is that right?

A. That is right.

Q. Do you know whether or not Mr. Kaiser has signed that contract?

A. I do not.

Q. Do you know whether anybody for the Kaiser Packing Company has signed it?

A. I do not.

Q. Beginning November 1, 1944, what has been your arrangement for compensating the boners who have worked with you? How have they been paid?

A. I get a weight slip every night and the amount of boners there is there that day. If you would have asked me, I could have brought them slips down and showed them. Maybe I have got one in my pocket. There (indicating) is [fol. 63] Monday's slip. (Said slip handed to counsel.) $14.25 apiece, six of us there.

Q. State whether or not the boning money received each week is divided equally among all of the boners boning?

A. That is right.

Q. State whether you receive any greater or additional share of the boning money than the other boners.

A. I do not.

Q. Has that been the practice regularly since November 1, 1944?

A. That is right.

Q. At the end of each work day, do you compute the earnings of each boner who has worked that day in accordance with the total of beef boned that day?

A. That is right. Everybody gets the same.

Q. If one boner has not worked the entire day, are his earnings reduced according to the number of hours he actually has worked that day?

A. That is right.

Q. Are you and the other boners satisfied with the 100-weight method of paying for boning? Are you satisfied with the method of being paid by the hundred pounds of boned beef?

A. Sure, we are satisfied.

Q. As long as you would be paid upon a satisfactory 100-weight basis, a satisfactory figure, would you of the other boners be satisfied to be put on the Kaiser payroll?

A. Yes, that is right.

Q. Since the new government regulations on trimming, has any suggestion been made that the Kaiser Company would put another trimmer in the boning vestibule?

A. That is right.

Q. Has Mr. Kaiser agreed to try to find another trimmer for that work?

A. He has. He has been looking for one or two, maybe three if we could get them.

Q. Is it your understanding that if he can find such trimmer or trimmers that they will be put in the boning vestibule in addition to the present trimmer and on the Kaiser payroll?

A. He would be on Kaiser's payroll, yes, sir.

[fol. 64] Q. In the period since November 1, 1944, have you made deductions for social security and withholding tax?

A. I have.

Q. From the boners working with you, is that correct?

A. Yes, sir.

Q. Have you made any other deductions than withholding tax and social security?

A. No.

Q. Have you carried in that period an accident insurance policy on the men working with you?

A. That is right.

Q. Have you paid a premium on that policy within the period since November 1, 1944?

A. It has been paid, yes, sir.

Q. Is that a quarterly premium, if you know?

A. I don't know.

Q. What is the amount of the premium that was paid, if you can recall?

A. I can't recall.

Q. Have you paid that premium out of your own pocket?

A. It will be paid out of my own pocket, yes; that is right.

Q. Have you paid the one per cent social security withheld by employers?

A. I have.

Q. Have you paid that out of your own pocket?

A. That has come out of my own pocket.

Q. Is the effect of those payments, Mr. Hooper, that your own earnings for your time spent in boning are less than those of the others.

A. That is no joke; it is less. If you will tell me how to get away from it, I will be away from it, too.

Mr. Smith: I believe that is all I have.

Cross-examination.

By Mr. Morrison:

Q. Just a question or two. Do you pay social security tax on yourself?

A. I do not.

Q. Or withholding tax on yourself?

A. No, sir, I do not.

Q. Who determines when you go to work in the morning?

[fol. 65] A. I do.

Q. That is for yourself and the boners?

A. That is right.

Q. Who determines when you quit at night?

A. I do.

Q. Does Mr. Kaiser have anything to do with that? I mean does he attempt to tell you?

A. He don't have nothing to tell me when to work or how to work outside of the job is there and we know that beef has to be boned and if we come up at nine o'clock we are going to have to work until six and if we come in at seven o'clock we will have to work until three-thirty, and anybody with common sense knows the inspector don't come at nine o'clock. He comes at seven a.m. and when he leaves everybody has to quit because nobody else can work in the plant unless he stays.

Q. How many days a week do you ordinarily work?

A. Five days a week.

Q. Do you sometimes work on Saturdays?

A. Half a day on Saturdays sometimes.

Q. Why would that be?

A. If they have to have the meat, we will work. If Paul asks me and says he has to have some meat and I ask the boys if they want to work, if they want to work we work, and if they don't want to work, we don't work.

Q. Who discusses those matters with Mr. Kaiser?

A. I do.

Q. When he discusses the manner in which the work is being done or the manner in which it is being turned out, to whom does he talk?

A. Well, he talks to me unless he happens to see them bones out there come out too dirty, maybe he will walk over and say we have to tighten up on the bones a little bit. Of course, we all know the work has to be done a certain way. Anybody that works in that kind of business and has followed it for years, they know what should be done and how it should be done and that don't happen very often.

Q. Does Mr. Kaiser have anything to do with the speed with which you work, that is, the amount that you turn out per hour? Who controls that?

A. Well, that is controlled by the gang. If I go in [fol. 66] there of a morning and I say we want six cattle or we want eight cattle, then the lead-off man, he has naturally got to try to make that.

Q. If there are more cattle, he naturally tries to work faster?

A. That is it.

Q. And if there is less, he naturally works slower?

A. That is right.

Q. That is controlled either by you or your lead-off man, is that right?

A. That is right—well it is just like anything else, a gang of people working like that, if everybody is feeling good, why, you get up and sail. Maybe come in and two men feeling kind of bad, well, they drop down and the rest drop down right along with them.

Mr. Morrison: That is all.

Redirect examination.

By Mr. Smith:

Q. What determines the number of cattle that the lead-off man says are to be boned in a certain day, such as sixty or eighty?

A. The lead-off man don't say; I am the guy who does the saying.

Q. What, then, determines the number that you say are to be boned?

A. Well, if you were running a gang, wouldn't you have to say what you are going to do in a day's work or would you leave it to somebody else to tell you what you were going to do?

Q. No, the question is, what factors do you consider in deciding how many are to be boned in a day? Does it depend upon the number being killed or what factors determine it?

A. No, I base my number on the amount of gang I have got there, ten cattle per man, and if I can make over ten cattle per man, I will go in of a morning and say, "All right, boys, we are going to get sixty cattle there," like this morning there were six. I will say, "Sixty cattle this morning." I am gone, you see. I will be up here a couple of hours and if I can go back and [fol. 67] still make the sixty, we will get it; if we can't, we will get fifty or fifty-five, whatever we can by three, and then knock off.

Q. Roughly, you multiply the number of men by ten the number of cattle you will bone that day?

A. That is right. If I would say sixty this morning and we was all there and we hit the ball and we got that sixty out by one o'clock, I would say, "All right, roll us out ten more," and that is the way it is worked.

Q. Your accident insurance policy, Mr. Hooper covers all of the boners except you?

A. That is right.

Q. Your hours are controlled pretty closely by the hours the inspector is there, is that right?

A. That is right.

Q. You cannot work other hours than he is there?

A. If that inspector is not there, you cannot work.

Q. His hours are regularly seven a. m. to three-thirty p. m., is that correct?

A. That is right.

Mr. Smith: That is all.

Recross-examination.

By Mr. Morrison:

Q. How much time do you take off for lunch ordinarily?

A. Well, it is usually always about thirty minutes since some time ago and we have a coffee time about a quarter of nine, about fifteen minutes for coffee every morning. Of course, we don't pay no attention. We always go about the same time, maybe gone fifteen minutes or twenty minutes or maybe just ten minutes. It don't make any difference only just working by tonnage so that is just up to us. It don't make any difference how long we are gone. If we are gone an hour it is all the same.

Q. You do whatever you want?

A. That is right.

Mr. Morrison: That is all.

Mr. Smith: That is all.

Mr. Morrison: May the signature be waived?

[fol. 68] Mr. Smith: Show the signature waived and the witness agrees.

(Witness excused.)

By agreement of the parties and the witness, the signature is waived.

Betty Good, Notary Public in and for Jackson County, Missouri. (Notary Public Seal.)

Notarial Certificate

STATE OF MISSOURI,
County of Jackson:

I, Betty Good, a Notary Public in and for Jackson County, Missouri, duly commissioned and qualified and authorized to administer oaths and to take and certify depositions, do hereby certify that pursuant to the foregoing stipulation to take depositions in the civil cause depending in the District Court of the United States, for the District of Kansas, Division 1, wherein L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, is Plaintiff, and Rutherford Food Corporation and The George Kaiser Packing Company are Defendants, I was attended at the law offices of Messrs. Morrison, Nugent, Berger & Johns, 1701 Bryant Building, in the City of Kansas City, in the County of Jackson and State of Missouri, by Mr. H. J. Smith, Attorney for the said plaintiff, and by Messrs. E. R. Morrison and Robert L. Hecker, counsel for the said defendants, on the days and dates hereinbefore stated; that the aforenamed witnesses, Thelma Anderson and Frank Hooper, who were of lawful age, were by me first carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth; and they thereupon testified as is above shown, and that the depositions as above set forth were reduced to shorthand by me in the presence of the witnesses themselves, and from their statements, and their signatures thereto expressly waived by agreement of counsel for the plaintiff and defendants and by the witnesses as hereinbefore set out, and that all was done in the presence of said counsel for said plaintiff and defendants.

[fol. 69] I further certify that I am not an attorney or counsel for and have no office connection or business employment of any kind with any of the parties to this action or with their attorneys; that I am not connected by blood or marriage with either of said parties; that I am not interested, either directly or indirectly, in the result of said action.

Witness my hand and seal as such Notary at Kansas City, Jackson County, Missouri, on this 26th day of January, 1945.

My commission expires August 22, 1945.

Betty Good, Notary Public in and for Jackson County, Missouri. (Notary Public Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEPOSITION OF PAUL OSCAR KAISER—Filed February 14, 1945

The examination of a witness, taken between the hours of eight o'clock a. m. and six o'clock p. m. of Thursday, December 28, 1944, at the law offices of Messrs. Morrison, Nugent, Berger and Johns, 1701 Bryant Building, in the City of Kansas City, in the County of Jackson and State of Missouri, before me, Vivian A. Krimminger, of Miles and Behrens, Shorthand Reporters, a Notary Public in and for the County of Jackson and State of Missouri, on behalf of the plaintiff, pursuant to the stipulation hereinafter set out.

Appearances: For the Plaintiff: Mr. H. J. Smith, Attorney, Wage & Hour Division, Department of Labor, 3000 Fidelity Building, Kansas City, Missouri, and Mr. John W. Johnson, Supervising Inspector, Wage & Hour Division, Department of Labor, 3000 Fidelity Building, Kansas City, Missouri. For the Defendant: Messrs. Morrison, Nugent, Berger & Johns, 1701 Bryant Building, Kansas City, Missouri. By Messrs. E. R. Morrison and Robert L. Hecker.

Stipulation

Before the taking of the within deposition, the parties, by their counsel, stipulate that the same may be taken at [fol. 70] this time in shorthand and thereafter typed, signed and regularly filed in the case, with the same force and effect as if notice had been given, subject to objections as to competency, relevancy and materiality.

PAUL OSCAR KAISER, of lawful age, being produced, sworn and examined on behalf of the plaintiff, deposeth and saith:

Direct examination.

By Mr. Smith:

Q. State your full name.
A. Paul Oscar Kaiser.
Q. What is your residence address?
A. 1036 Calvin Avenue, Kansas City, Kansas.
Q. What is your business?
A. We are running a packing house at 81 North First Street, Kansas City, Kansas, going under the trade name of George Kaiser Packing Company.
Q. Is the George Kaiser Packing Company a corporation?
A. Yes, sir.
Q. From what date has it had a corporate status?
A. I haven't the exact date. It is about six—about seven years ago, when Mr. Benjamin made a corporation out of it. He was a partner at that time.
Q. Was that 1938?
A. Yes, sir, Lionel Benjamin.
Q. To a period, from 1938 up to the present time what has been your position with The George Kaiser Packing Company?
A. The President.
Q. Have you been President throughout that period?
A. Yes, sir.
Q. What has been the nature of your work at the company through that period?
A. Well, I call it a one-man packing house, and I have been everywhere from the stockyards to the tank house, killing floor, cooler, and out on the street in a truck, all of it.
[fol. 71] Q. I will state that a little differently. Have you been the active manager in charge of the plant since 1938?
A. Yes, sir.
Q. Through the period beginning in 1938, has there been any substantial change in the kind of work done at the plant?
A. Well, we were—at that time we had quite a bit of city

business and also car route, shipping carload lots to Chicago and eastern points.

Q. You had a different type of customers then, is that what you are saying?

A. Yes, sir, than we have at present.

Q. Has the nature of the work changed in that period? Have you been engaged in slaughtering cattle throughout that entire period?

A. Well, it has been practically all cattle the last two years, but before that we had killed some hogs and a few calves, and cattle too.

Q. In 1938, was the larger part of your business the slaughtering of cattle?

A. Yes, sir.

Q. Now, the next few questions I ask you will relate to the current operations at the plant, as distinguished from the operations in past years. Explain just what operations are conducted at the plant, where the cattle is purchased, how it is brought to the plant and what is done exactly in the various steps at the plant.

A. Well, of our present kill now of 350 cattle, there are about 150 that come from the St. Joe stockyards and the balance bought at the Kansas City stockyards. These cattle are hauled from the stockyards to our plant, put in our pens, brought in for slaughter under B.A.I. inspection, coming to the coolers and they are then stamped by the B.A.E., Bureau of Animal Economics, and these orders for the two—last two years, the Army Inspector then stamps and grades the beef according to the Army rules and specifications. They are then brought in this boning room and boned for Army purposes, which at the present is this chili contract here, but a year and a half ago they were all going to Stokley Brothers, also for Army use. That was in Indianapolis, Indiana.

[fol. 72] Mr. Hecker: Are you right on your time? It has been more than a year and a half ago, hasn't it?

A. Well, we started it two years ago last August, bought for Stokley Brothers. We bought five months, then Rutherford came in in March.

Q. A year ago last March is the date you identified? You started to bone for Rutherford in March of 1943, is that correct?

A. That is right, but for Stokley Brothers in October, about October the year before.

Q. Now, you spoke about the carcasses coming into the cooler. What is done, give us just a little more detail before the carcass reaches the cooler. What are the operations after the slaughtering and before the carcass reaches the cooler?

A. Do you mean the skinning part of it?

Q. Yes, what is done, just in a few words.

A. Well, these cattle are first knocked in the head, slit their throats and let them bleed. They are laid on the floor and skinned as far as they go, almost to the floor with the hide. Then they are run up on a hoist and raised up and they pull the hide off, hang them on the rails on rollers, trolleys, they call them, and split and washed and weighed and then pushed in the cooler.

Q. Are the heads boned?

A. Yes, sir, the heads are boned.

Q. Where is that done in connection with the killing room?

A. Right in the killing room there, to the east of the killing floor. Where the cattle are laying there on the floor, where you have seen them killed, the man on the wall was boning those heads.

Q. Is there one man who has that job?

A. Yes, one man takes those tongues out, washes them, takes the cheek meat off, and then there is a lady that washes the cheek meat for him.

Q. What is the capacity of the room you call the hot cooler?

A. It holds around 70 cattle.

Q. Are the carcasses moved into the hot cooler directly from the killing floor or killing room?

[fol. 73] A. Yes, sir.

Q. For what period are they kept in the hot cooler?

A. Well, we try to hold them there about 18 to 24 hours.

Q. Does that mean overnight?

A. Overnight.

Q. Then are they moved into the main cooler the following morning?

A. That is right.

Q. Does that mean a period of 24 hours or sometimes less that they are held in the hot cooler?

A. Sometimes 24 hours or less, because cattle killed at seven o'clock in the morning would be 24 hours old the

next morning at seven when we pull them, but the cattle killed at three o'clock in the afternoon would not be quite that old, see.

Q. What is the capacity of the main cooler?

A. 250 to 300 cattle, we have crowded them in there.

Q. How long are the carcasses kept in the main cooler?

A. In the main cooler from 24 to 72 hours.

Q. How long after the animal is killed is usually the time at which it is boned?

A. Well, if the beef boners are ahead of the killers on the killing floor, we sometimes bone them in 24 hours, but the Army wants 48.

Q. Then the period from the killing to the boning is 24 to 48 hours, is that correct?

A. That is right.

Q. So the time spent in both coolers together usually is 24 to 48 hours?

A. That is right.

Q. Is that correct?

A. That is right.

Q. Ordinarily in the main cooler, while the capacity, as you say, is about 250, there is usually just one day's kill at one time in there, is that correct?

A. No, sir. There is usually two days'. The room had about 150 cattle when you were in there yesterday. That is practically two days'. When they have a whole day, or the beef boners drop off, if one man lays off, that slows up maybe ten cattle a day, and two of them lay off, that is twenty cattle, but they have boned up as high as twenty cattle, and they used to kill as high as twenty cattle, but the [fol. 74] union don't allow them, under the present set-up, to kill so many cattle.

Q. By what process are cattle moved from one part of the plant to another?

A. They are run on an overhead rail.

Q. They run from the killing room into each cooler and into the boning vestibule by that method?

A. By that method, that rail. That is practically the only method that this beef is handled all over the country, is on a rail.

Q. What percentage of the present kill is now boned in your boning vestibule?

A. Approximately 95%.

Q. What is done with the other five percent?

A. Well, we sell a few cattle here in the city. Sometimes we ship a party up here in Minneapolis maybe five or ten cattle.

Q. Do the carcasses of those beef that are not boned move through the boning vestibule to get to the dock?

A. Yes, sir. They have to go across that scale. They are weighed there and go through, but they don't go on the boning rail.

Q. To what destination does this 95% that is boned go at present?

A. It all goes to Rutherford Food Corporation.

Q. For what period of time has that been true?

A. Since March 5th or 6th of last year.

Q. That is of 1943?

A. That is right.

Q. Between October of 1942 and March of 1943, was boning done in the boning vestibule in the plant?

A. Just from October 15, 1942 to the time that Rutherford came in.

Q. Did you provide any boned meat to the Rutherford Food Corporation in that period?

A. No, sir.

Q. What was the destination of the boned meat in that time?

A. It all went to the Stokley Brothers Cannery at Indianapolis, Indiana, and then Feinberg's, which is now the Royal Food Products, they received some, Neuer Brothers, Loschke & Stelling and Delico Meat. That was [fol. 75] all on government orders, all stamped. Every bit had to be stamped by an Army Inspector. You seen the young man working there? He had to stamp on that horseshoe stamp on every piece of beef and there is usually one on the side, but if they are quartered in four pieces, each one will have to have the stamp. If they have meat for Army camps, each quarter has to be stamped and wrapped individually. We did some of that too before we were boning.

Q. Mr. Kaiser, I understand in your business, there are by-products, offal and hides and the like. Will you explain what disposition you make of those products?

A. The hides are picked up every night by Bert Lyon and Company, at the hide house at 2nd and Walnut, and

those hides are weighed and the price runs about twelve cents a pound on those hides, and they average about sixty pounds apiece.

Q. What other products come as a result of your business?

A. Well, you have the liver, the heart, the tongue, the cheek meat, considered offal.

Q. To whom are those items sold?

A. Well, we sell livers to different firms here in town. We have to put some in the freezer until we accumulate a carload, then we ship them through our broker at Chicago to different concerns either in Chicago or further east. The same applies to the others, such as cheek meat, hearts and tongues.

Q. Do you process any by-products of your business at your plant?

A. No, sir, none of this offal, only the entrails and scraps that go to the tank house.

Q. Is that cooked at the tank house?

A. Yes.

Q. What is the purpose for that and what type customer?

A. We make what we call meat scrap. That is for chicken feed and hog feed is where it is used.

Q. State, if you know, Mr. Kaiser, about what proportion in value the boned meat that you provide the Rutherford Corporation bears to the value of other products which come out of your plant.

[fol. 76] Mr. Hecker: You mean the 95%.

By Mr. Smith:

Q. I am comparing the 95% to the total value of other products which come out of your plant. That would cover the 5% of the carcasses and also would cover bones, hides, offal and tankage.

A. We figure this offal off these cattle—it would run $12.00 to $14.00 a head. That is the offal, including the hide.

Q. What I want now, Mr. Kaiser, is just some statement about the proportion of value of the boned meat that comes out of your plant with all other products of your plant. Is it three-quarters of the value of the whole plant, 90% of what figure?

A. Well, now, we figure this boneless meat they get,

receive on the OPA price ceiling, which is $17.40; that is the boneless meat.

Q. That is $17.40 per hundred?

A. That is right.

Q. That is what you are paid by the Rutherford Food Corporation?

A. That is the ceiling price; that is right.

Q. What other value comes out?

A. (Interrupting) Out of them cattle?

Q. Yes.

A. That would be that hide, the tongue, liver, heart, the cheek meat and the bones and entrails that go to the tank house would be around about, I would say, $14.00.

Q. Take a hundred pounds, Mr. Kaiser, of weight on the hoof, what percentage out of that; what is the value of that in boned meat and the value in other items that you produce?

A. Well, we never checked those figures so close. I always leave them to Herman in the office.

Q. You were speaking of $14.00 just now. What were you going to say about $14.00?

A. That is about the approximate value of the hide, tongue, heart and by-products you get in the tank house.

Q. Per animal?

A. Per animal; $14.00 per animal, not per pound.

Q. How many hundred pounds of boned beef comes from one animal?

A. An animal that will weigh 800 pounds alive, you would have to figure about—a 900 pound animal will make you about 450 pounds of carcass.

[fol. 77] Q. And the value of that in its boned state to you is $17.40 per hundred pounds?

A. That is right, per hundred pounds. That would bone out about 73% meat.

Q. The boned meat is placed in barrels in the boning vestibule, is that correct?

A. Yes, sir.

Q. Then it is weighed?

A. Weighed at our dock, put on a truck and hauled to the Rutherford Food Corporation.

Q. State what your present process is for keeping your barrels clean.

A. We have a wash room with a tank that holds two barrels, and they fill that with hot water and washing

powder and those barrels are washed and then they are brought over a table that has a steam and hot water pipe up through it and the barrels are turned upside down and steamed out and also washed with water, because the steam would dry certain little blood left in the barrel, it would dry that, and back there they have to use hot water to rinse them barrels thoroughly.

Q. How many men work in that room?

A. I have one man that does that.

Q. Is he an employee of the Kaiser Packing Company?

A. Yes, sir.

Q. Do you have laborers who work in the boning vestibule, Mr. Kaiser?

A. Yes, sir.

Q. Do they move barrels and bring in empty barrels and do that kind of work?

A. Yes, sir.

Q. How many men spend the major part of their time in the boning vestibule?

A. Two men.

Q. What are their names?

A. Nick Jaksic, and Charlie, I believe it is, Lombardo or something. I can't just get the name right. I think it is Lombardo, but those men change just like you change horses on a wagon. If one of them is sick, I have to put somebody else on. There is days I have to go in and help them out.

Q. I understand there are two jobs there. There is [fol. 78] a place for two men doing that kind of work moving barrels?

A. Yes.

Q. Do they do anything else besides moving and removing barrels, moving carcasses?

A. First they pull the cattle out of the cooler. They pull them off these inside rails into this boning room. They bone about ten cattle an hour and they don't take but five minutes to push those cattle out, and then they look around to see if there is a little fat or a little hide or a little dirt on that beef. They have to trim that off. They weigh it and push it across that rail, and bring it back on the rail where these beef boners work. We never work on that rail. We go through that room, but we don't work on their rail.

Q. That work is done on the rail that goes directly from the cooler to the dock?

A. Yes, sir.

Q. Is that correct?

A. That is where we work. We shove them on their rail and never touch them after they get hold of them.

Q. Mr. Kaiser, you yourself do work in the boning vestibule?

A. Yes, sir.

Q. Is that the type of work you have just described as done by these two laborers?

A. That is right.

Q. State whether or not any of the cooler men assist in moving carcasses into the boning room on occasion.

A. Yes, sir. Sometimes Mr. Medved pushes them in there and sometimes a truck driver pushes them. With a little company, you have to work everywhere.

Q. You have two truck drivers that sometimes do that kind of work, is that right?

A. Yes.

Q. Did they sometimes haul barrels from the boning room?

A. Yes, sir.

Q. Who carries the clean barrels into the boning vestibule?

A. The same men. They roll those full barrels out and bring empty barrels back in. The man who washes the barrels puts them in front of the door for them.

[fol. 79] Q. Does the man who washes barrels do work of that kind?

A. Occasionally he might give them a little shove, push them up on a truck, something like that.

Q. How many boners work in the boning vestibule at present?

A. Well, as a rule there is six men and that one girl, but she works for us.

Q. You are speaking of a girl who does trimming, is that correct?

A. Yes. She works for us.

Q. Is her name Thelma Anderson?

A. Thelma Anderson.

Q. She is an employee, you say, of the Kaiser Packing Company?

A. Kaiser Packing Company, that is right.

Q. At what rate is she paid?

A. She is paid, I believe, 75 cents an hour.

Q. At what rate is she paid for hours in excess of forty?

A. Time and a half over forty.

Q. Does she work occasionally hours in excess of forty?

A. Yes, sir.

Q. The work week?

A. Yes, sir.

Q. Does that happen when she works six days in the work week; do her hours ordinarily exceed forty?

A. Well, these beef boners some days, they will work eight hours and some days they will work ten, according to what they want to do.

Q. State whether or not the ordinary six day week in the boning vestibule is hours over forty work week.

A. It would be hours over forty, yes, sir.

Q. State whether or not the ordinary work day is eight hours in the boning vestibule?

A. Well, here it is, they very seldom work over five days, and they might average some weeks forty hours in there and they might some weeks run forty-five.

Q. State whether or not Thelma Anderson's hours run about the same as that of the boners.

A. It usually does, but there has been several times when I bought some rough flanks outside, and she [fol. 80] worked an hour or two later in the cooler pulling those flank steaks out.

Q. That is extra work, outside the boning vestibule?

A. That is outside the boning room, yes, sir.

Q. But she worked for you, is that correct?

A. Yes, sir.

Q. What exactly does Thelma Anderson do?

A. She is a trimmer. That means that she pulls any of this tissue that the government don't want in its meat and trims any blood clots and she also takes out the kidneys and removed it from the fat part of the kidney, the kidney knob. You call it kidney; in a cow it is called a kidney knob and you split that and take the kidney out and the rest of it is that fat.

Q. State whether or not that used to be done by the boners.

A. No, the boners never did do that. We used to roll them in the cooler and the men in the cooler did that.

Q. Did she do certain operations relating to meat that goes into the barrels where the boned meat is thrown?

A. Yes, sir, she throws the meat—she trims the tissues and blood clots and things off that meat. They throw her the pieces and she throws that meat in the barrel when she gets it trimmed.

Q. That meat is weighed right along with the meat boned by the boners, is that correct?

A. That is right.

Q. And the boners are paid for the meat that she has handled, the same as for the meat that they have handled?

A. That is right.

Q. Does she do any rib boning?

A. If she does any rib boning, she does it for them, not for us.

Q. Has she ever done any rib boning for you?

A. No, sir, not for us, but she—I have seen them throw her extra bones, and if she had time she would knock the meat off just for them, see.

Q. Do you mean to suggest that she is paid by them for certain work?

A. No, sir, I wouldn't say that. She just likes to keep busy and she helps them out sometimes. They [fol. 81] probably help her too when she has things she has to trim and they help her out.

Q. She is paid on an hourly basis by the Kaiser Packing Company?

A. Yes, sir.

Q. Does she punch the time clock?

A. Yes, sir.

Q. Do you have an employee by the name of Gunderson?

A. We did have.

Q. Is that man now deceased?

A. He left the plant and we don't know what became of him. The last we heard of him was in the north end. He always lived in the north end at a hotel. We used to have him in there working over some of them bones, and he finally dropped out, so they are finishing their bones themselves, these meat boners, but he used to leave a lot of meat on the bones and we didn't want to leave them to go the way they were, and we used overhaul to get what we could out of them.

Q. You mean Gunderson was an employee of the Kaiser Packing Company? You employed him to get meat off of these bones that were left on by the boners?

A. Yes, sir.

Q. Did he do a considerable amount of rib boning?

A. His was all rib boning. When they were through and waiting to throw them out on the street, we would have the boy bring him the bones and he would pick us up about a half a barrel of meat a day.

Q. At what place in your establishment did he work?

A. In the cooler.

Q. Is that what I have spoken of as the main cooler?

A. Main cooler, yes, sir.

Q. Was he paid on an hourly basis?

A. Yes, sir.

Q. What other boning is done in your plant outside of the boning vestibule besides this rib boning done by Gunderson and the head boning done in the killing room?

A. None.

Q. Is certain boning done for the city trade in the boning vestibule?

A. No.

[fol. 82] Q. That meat all goes out in carcass form, is that correct?

A. All goes out, yes.

Q. Whom did you have doing this trimming before Thelma Anderson?

A. Why, before Thelma Anderson come in we used to have Tony Mercer and his wife in the cooler there with Medved. They would trim some, but the Army wouldn't stand for that trimming any more in the cooler, because they wanted to see it all right there in one spot, and we used to have an awful loss on poor trimming. When you could cut a piece of meat off the thickness of a knife, a piece of fat, they would cut two inches deep, and there would be several barrels of lost meat every day on account of that. That is why we had Thelma Anderson come in.

Q. Peter Medved is a salesman?

A. Yes.

Q. He and his wife did some of that?

A. No, Tony and his wife, he quit about four months ago, him and his wife both, and he works at the U. S. Packing Company now.

Q. Were they both employees of the Kaiser Packing Company?

A. Yes, sir.

Q. State whether or not Thelma Anderson now spends her full time working in the boning vestibule, with the exception of this occasional extra work that you have already told about?

A. Yes, sir, she does. The Army requires that she stays there at that table. She can't leave that room and trim any meat, because it is the Army who wants to inspect the carcass and the bone. If you went in the other room, the Army wouldn't know if it was from some other carcass or where it came from, so it must be done right there under his supervision.

Q. Is there an employee of the Rutherford Food Corporation by the name of Askins now working at your plant?

A. Yes, sir.

Q. Does he work at the plant full time?

A. Well, there has been times he would be gone for a week or two and he would be up at the plant, Rutherford's plant.

[fol. 83] Q. For most weeks, he spends the full time at the Kaiser plant?

A. That is right.

Q. Is that correct?

A. Yes.

Q. And he does that currently, is that correct?

A. That is right.

Q. Does Mr. Askins perform any work in the boning vestibule?

A. Well, there is times when the help don't show up, that he has helped me trim some of this beef. That is what I mean, trim any dirt or piece of hide, particles of hide or any rail dust. When they run on the rail sometimes a little dust drops on this meat, and we have to trim that rust or rail dirt or whatever it is off this beef before they will take it.

Q. That is done in the boning vestibule, but on this main rail that runs through the boning vestibule?

A. That is right.

Q. As distinguished from the rail that is used by the boners, is that right?

A. Yes.

Q. You have done that work and so has Mr. Askins on occasion?

A. Yes.

Q. What other employees of the Kaiser Packing Company have performed that kind of trimming work?

A. Well, that is about all I recollect of right now. We have had other men there. We have had other—we had an old gentleman there by the name of——

Q. Mr. Woodcock?

A. Woodcock. He went down to the country last fall or winter and died, so I put this Jaksic boy in.

Q. Woodcock did that kind of trimming work also, is that correct?

A. Yes.

Q. This Jaksic boy is Woodcock's successor?

A. That is right.

Q. He now has the job?

A. Yes.

Q. In what part of the plant do you spend the most of your time, Mr. Kaiser, the front part, the office, the cooler and boning vestibule?

[fol. 84] A. I really couldn't tell you. I am all over that plant so many times a day I couldn't tell you how many times I do go around. I expect, though, I spend a little more time in the office.

Q. How many times a day do you go into the boning vestibule?

A. I probably go through there a dozen times a day.

Q. How many times a day do you caution the boners with respect to getting meat off the bones?

A. I am on them continuously.

Q. You are continuously cautioning them about that, is that correct?

A. That is right. Did you notice the bones out there in that rig, and all the meat on them? They are supposed to clean those bones good and clean. They should sandpaper them, we say, but in the big packing house when they get a bunch of bones like that, they are apt to bring them back in to them and make them go over them again.

Q. Since the boners are paid by the weight, is that the reason—

A. (Interrupting) No, sir, that is our loss; that is our

loss. If there is 200 pounds of meat, we have lost $35.00 there.

Q. I think you misunderstand me. The boners are paid by weight, is that correct?

A. Yes, sir.

Q. By weight, of boned beef?

A. That is right.

Q. Now, they want to make as much money as they can, so they get careless about getting meat off the bones.

A. That is right. They want the big chunks and let the little pieces, like fingers, between the ribs, go.

Q. Have you ever employed anybody besides Gunderson to work on the bones after the boners have finished?

A. Well, we had a Forrest Inman in the cooler. I believe you talked to him, Mr. Johnson, last spring. He went to Seattle to work in a plane factory. He used to do a lot of that. He used to like to pick a barrel of those bones, the back bones you have about a pound of meat. He used to like to pick up a barrel of them, and he would show me a little stack of meat, "I have made you $10.00 right there." He used to get a kick out of [fol. 85] doing that for me, Forrest Inman. He used to work on them some.

Q. State whether or not anybody has worked in the boning vestibule doing that kind of work after the boners are through.

A. No, sir.

Q. State whether Mr. Askins has on occasion cautioned the boners about getting all the meat off the bones.

A. Well, if I had to leave, I would ask Al to kind of watch it for me.

Q. Does he represent you when you are gone from the plant? Is he in charge?

A. Well, he tries to help me, be my assistant when I am called away. Now, today I asked him to watch the cooler while Pete Medved and I both are gone. He is watching that today.

Q. Do you know whether or not he cautioned the boners on occasion to get the meat off the bones?

A. He probably would ask them to watch them.

Q. How about Mr. Woodcock or Mr. Gunderson, do you know if either of those men have ever checked the boners to get the meat off the told the boners to get the meat off the bones?

A. Well, they would come to me and tell me that they are awful careless, there is a lot of meat going to waste. That meat is lost to our plant.

Q. You would undertake that cautioning yourself, or Mr. Askins might in your absence, is that correct?

A. It might be, yes, sir.

Q. Throughout the period beginning in March of 1943, has Mr. Askins done about the same work as he does now at the plant?

A. Just about the same. If we had all our gang there, Al would sit there in the office and just keep in touch with the chili factory to see if they had enough meat, and if they had too much, he would tell him to stop the supply coming up and put it in the cooler. Sometimes we would have fifty barrels of meat sitting in the cooler at the plant, and the next day they would run heavy and they would take it all and take thirty barrels of meat, fresher meat. They aim to send it right out the door.

[fol. 86] Q. Does Mr. Askins lend a hand moving barrels and things like that when it is needed?

A. He has sometimes.

Q. Has he ever been on your payroll, the Kaiser Company payroll?

A. No, sir.

Q. Has he always been on the Rutherford Corporation payroll?

A. Yes, sir.

Q. Did you ever have an occasional employee by the name of Flinker worked for the Kaiser Packing Company?

A. Flinker?

Q. John Flinker.

A. Flinker has done occasional work for us, yes, sir.

Q. Is Flinker at present a boner in the boning vestibule?

A. Yes, sir, he is.

Q. Have you taken him off of that work on occasion and given him trimming or other work?

A. After the boys were through, after the boner was through he would do some work for us.

Q. After they were through in the evening?

A. Yes, sir, in the afternoon when they got through, he would do some work for us.

Q. Was he paid on a straight time hourly basis for that work for you?

A. Yes, sir.

Q. At what rate of pay?

A. Why, it is either 73½ or 75.

Q. Is that the rate for trimming?

A. That is the rate for trimming.

Q. Is that the work he did for you?

A. Yes, sir.

Q. Is he doing that work for you currently?

A. At times, he is, yes, sir.

Q. Has he done any other extra work for you?

A. Well, there is times he has helped us in the cooler on days when they wasn't working. If they didn't go on Saturday he would help us in the cooler on Saturday.

Q. Did you ever pay Mr. Flinker at an overtime rate of pay for any hours that he worked, that is, time and one-half?

[fol. 87] A. I believe some weeks it might have run that. Herman handles all of that and I am not exactly familiar with all of it.

Q. Do you mean on some work he may have worked for the Kaiser Packing Company more than forty hours, is that what you mean?

A. Yes, sir.

Q. What are the names of the other boners besides Mr. Flinker who works currently in the boning vestibule?

A. Otto Schindel and Troy Weems and Frank Hooper and Oliver Deer and Oliver Williams and we have another one there, I can't think of his last name. He is a little short fellow. We call him Swedie, but that isn't his name. Lee Behrens, Cunningham and the other boys are in the service.

Q. Mr. Kaiser, wouldn't there be occasions where the boners have boned a limited number of cattle for the Kaiser Company at a price per head?

Q. Well, now——

Q. $1.50 a head?

A. I will explain that to you now. What we call throw-out cattle that the Army man doesn't take, maybe there is ten or 'ifteen a week, and those usually are turned down because they are real thin, not much meat on them, and when the Army rejects them, then we have to bring them out to them and they bone them at $1.50. That is the only way they will take those cattle is $1.50 a head.

Q. And the boners are paid at that rate for that type of boning?

A. For those ten or twenty or fifteen cattle, yes, sir.

Q. You said a few minutes ago, Mr. Kaiser, that there wasn't any boning done except for the Rutherford Food Corporation. You want to correct that now, do you?

A. Wait a minute then, those cattle are taken up there and they put those—what little commercial chili they make, they also go to Rutherford's but not under Army stamp.

Q. What percentage of your total? About a dozen head a week did you say?

A. A dozen or fifteen a week.

Q. A little earlier you spoke about 350 head being the current output; you meant on a weekly basis, is that correct?

[fol. 88] A. Yes, sir, on a weekly basis.

Q. About 350 per week? Does that mean that runs about 60 or 70 per day that are killed and processed in your plant?

A. It would run from 50 to 75 a day. If there is not enough help on the killing floor, they figure about one cattle per man per hour, and if one man doesn't show up, it means eight, and if three men, there is twenty cattle lost on the kill, so that is why there is a sliding scale. You don't know whether you kill fifty cattle or seventy-five cattle.

Q. You operate five and six days a week depending on circumstances?

A. It has been five. Last week it was four. The men refused to work last Saturday.

Q. There have been weeks when you have worked six, is that correct?

A. That is right.

Q. Now, as to the boning vestibule—that is what you call it, isn't it, Mr. Kaiser, boning vestibule?

A. Yes, sir.

Q. Is that the right language? Explain what equipment is in that room.

A. We have two tables.

Q. Are those long tables, each one takes a large part of the side of a wall?

A. That is right.

Q. What other equipment?

A. Well, that is all the equipment we have, are those two tables with walnut tops on them.

Q. Are a number of barrels in and out of the room being filled with boned beef?

A. That is right.

Q. Are those metal barrels?

A. Metal barrels.

Q. Are they kept in the middle of the floor of the boning room?

A. That is right, middle of the floor.

Q. State whether or not there is another table besides the two you have identified that are used?

A. A small table that Thelma Anderson works on.

Q. Is that in the center?

A. Center of the room.

[fol. 89] Q. Of the room and that is used for trimming?

A. For the trimming.

Q. Do the boners wear aprons?

A. They wear a leather—heavy leather bib over the apron. They wear aprons and bib, and if the knife slips, they don't puncture themselves.

Q. Whose property are those aprons and bibs?

A. The bibs belong to them. We furnish them with a clean apron.

Q. The aprons are the property of the Kaiser Packing Company?

A. Property of the Faultless Laundry.

Q. You have a contract with the Faultless Laundry?

A. Yes, sir, they do all our washing.

Q. And the bibs?

A. Just the aprons.

Q. The bibs are the property of the individual boners, is that correct?

A. That is right, and they are just about the size of the back of that chair, leather, and they wash those with warm water theirselves.

Q. State what tools the boners use.

A. All they have is a knife and steel and hook.

Q. The knife and hook are each quite small, are they not?

A. Well, the boning knife is a knife about six or eight inches long, real narrow blade, sharp pointed blade and

they use a meat hook in their hands that they hook the meat, that hook, and then trim with the knife to keep from cutting theirselves, is the reason they use the hooks.

Q. Do they also have a knife sharpener?

A. They have whet stones, yes, sir, that they use.

Q. Whet stones?

A. Yes.

Q. State who owns the knives and sharpeners and hooks?

A. They own them, the beef boners own them.

Q. You mean on an individual basis?

A. Each individual man owns his own tools.

Q. State whether or not, if you know, that is customary in the business for individual boners to own their own knives?

[fol. 90] A. Yes, sir, all butchers buy their own knives and steels.

Q. At other plants in the Kansas City area regardless of how the boning is handled individual boners own their own knives, is that correct?

A. Yes.

Q. In your plant in the killing room, who owns the various tools that are used?

A. The men own their knives and steels and we own the cleavers and saws. They are all hand saws.

Q. All knives are owned by individual workers every place in the plant?

A. Yes, sir. The cleavers belong to us, but the saws are rental saws from the Pittsburgh Erie Saw Company. They are not our own property, rented saws.

Q. The saws are rented by the Kaiser Packing Company, is that correct?

A. That is correct.

Q. Who provides the service of cleaning the boning room and lighting the boning room?

A. We do.

Q. That is the Kaiser Packing Company?

A. The Kaiser Packing Company.

Q. Is there any equipment or tools of any kind used in the boning vestibule that the individual boners or the boners collectively provide, except the belts, the knives, the hooks and the sharpeners?

A. No, sir.

Q. You provide the service of washing the barrels?

A. That is right.

Q. And that is done in a washing room?

A. Washing room.

Q. Is that located ten or fifteen feet from the boning vestibule?

A. About twenty feet from the boning vestibule.

Q. Who owns Thelma Anderson's knife?

A. She owns it. That is her own property.

Q. She owns that individually?

A. Yes, sir.

Q. State, if you know, how many pounds of boned beef the average boner bones in an hour.

A. Well, we never have checked our men. Herman has [fol. 91] the figures on those cattle, and the only way you could get those would be to divide—if you had seven boners, you would divide that seven into the number of pounds per day, and that would give you an average.

Q. Just give us your own best estimate of that, if you can make one.

A. Well, I would say they would bone from 350 to 400 pounds per man per hour, just a rough estimate.

Q. That would be rough average production?

A. Yes. That depends upon the cattle. If you get good plump cattle, you get a lot of meat off them, like a plump chicken, or just like a little scrawny white leghorn.

Q. You pay the boners on a collective poundage basis?

A. Total poundage basis for the day.

Q. That is for all the boners collectively? You don't pay them on an individual piecework basis?

A. No, sir.

Q. And the method of payment, state whether or not it has always been on a per hundred pound basis?

A. Yes, sir.

Q. And has it always been on a per hundred pound of boned beef basis?

A. Yes, sir, always on per pound of boned beef.

Q. State how that has varied since October of 1942, as to how great a rate you have paid per hundred pounds for the boning operation.

A. How great?

Q. How great, yes.

A. When we start them, we start them with 40 cents a hundred, then after they have boned six or eight months

or a year, they said if we gave them an extra nickel on the hundred, they would do a better job, and it still didn't prove out. Then I had this man Gunderson, come in and he averaged $35.00 to $40.00 worth of meat a day inside for them, for me.

Q. You have always had trouble with the boners in getting the meat off the bones, haven't you?

A. Always have.

Q. Isn't that the job they are to do, to get the meat off the bones?

A. That is true.

Q. You caution them every day about that?

[fol. 92] A. You have to caution them all the time, because they want the large chunks and let the little stuff go, because the big pieces is what puts a lot of cattle through the room.

Q. What time do the boners start work in the morning?

A. Exactly seven o'clock every morning.

Q. How long is their lunch period?

A. Well, it seems to me they take about fifteen to twenty minutes for breakfast around nine o'clock, then again dinner at eleven-thirty, anywhere from twenty minutes to half hour.

Q. State the time in the afternoon that boning operations usually cease.

A. It is usually about three-thirty.

Q. Boners operate five or six days a week?

A. Yes, sir, and if they want to go hunting or fishing they work three days, all right, and the Army demands more meat, and I can't get it.

Q. State whether or not the work of these two laborers in the boning vestibule and the work of the man who washes the barrels and the work of Thelma Anderson, who does the trimming, is all related to the work of the boning, as to the time it has to be done.

A. They work right on that time but our boy will work later than that.

Q. State whether or not if the boners do not work on a certain day, whether there would be any work for Thelma Anderson and for the two laborers to do in the boning vestibule.

A. Well, there is some Saturdays we had extra rough flanks to work on, we would have her in on Saturday and

work three or four or five hours, and those boys, we can use them around the coolers for other work, when they are not working with the boners.

Q. But there is no work for the vestibule to do except when the workers or boners are working, is that correct?

A. That is right. We have to keep that room clean, and I don't want them to go in there and dirty two tables, so they have to work in the coolers, if they have anything else to do.

Q. What hours does Peter Medved work?

[fol. 93] A. He comes in at six-thirty and goes home at four-thirty.

Q. An hour for lunch?

A. Well, he takes a half hour, sometimes forty-five minutes for lunch.

Q. Six days a week?

A. No, sir, he goes home anywhere from nine-thirty to twelve o'clock on a Saturday and comes in at six-thirty on Saturday.

Q. The hours are five days a week and a short day on Saturday?

A. Short day on Saturday, yes.

Q. Do you remember when Mr. Askins first came to work at the plant?

A. I couldn't say exact, but probably several weeks after Rutherford came in there, which would probably be sometime the latter part of March or in April when they first came in, in 1943. Of course, I know that they had in their mind that they wanted that to be watched pretty close, because there had been time when they had other places where they throwed an awful lot of fat in there, in their product, and I think they had help down there to watch.

Q. Was it very soon after the Rutherford Corporation became your customer that Askins first came to the Kaiser plant?

A. Yes, sir.

Q. And he has been there continuously ever since?

A. Yes, sir.

Q. Most weeks on a full time basis?

A. Weeks that they would take him up at their plant. He was a shipping clerk up there and they would have something up there for him to check and he might be gone

a week sometimes, or two, but I had no record of him at our plant.

Q. You made the first arrangement for the boning in October of 1942, is that correct?

A. That is right.

Q. What boning was done in your plant prior to October, 1942?

A. Well, before that we would have maybe, on thirty, forty boned rounds or chucks just for city orders. Maybe [fol: 94] we would bone three or four or five cattle a day for city orders.

Q. Was that boning done in the vestibule?

A. No, in the cooler.

Q. Was that boning done for quite a period by Mr. Doliner?

A. Sam Doliner, him and Forrest Inman would put up city orders and we would sell a customer maybe three choice sides of beef and they have to cut it up, they used to break the beef between them. By "breaking" I mean cut in standard cuts for the butcher shops in Kansas City.

Q. Doliner spent his entire time butchering and boning, did he not?

A. That is right.

Q. He was an employee for the Kaiser Packing Company?

A. That is right.

Q. In your union contract, Mr. Kaiser, you have a classification for butcher boner, do you not?

A. Yes, sir.

Q. And the rate of pay given?

A. Yes, sir.

Q. Was Mr. Doliner paid under that rate of pay?

A. Yes, sir.

Q. That was his classification?

A. His classification.

Q. You never had any wide-scale boning, though, until the middle of October, 1942?

A. That is right.

Q. And that was occasioned by these contracts with different companies that you already have testified about?

A. Yes, sir.

Q. State with whom you had or made the first boning arrangement?

A. With Stokley, for the boning.

Q. For the boning?

A. Jim Reed and Peterson.

Q. What gave occasion to your contacting those two men about the boning?

A. We knew we would have to start giving the government practically our entire output, so I was inquiring from [fol. 95] several different people about boners and these men came in to me and said they had been boning beef in St. Louis that way for years and years, and they propositioned us on that basis of forty cents a hundred.

Q. So much per hundred, that is what we call piece work basis, is it not, Mr. Kaiser?

A. No, I don't believe you would call that piece work. You would call that poundage.

Q. A poundage basis?

A. Piece work in a packing house, they take a side of beef and cut it up in five pieces.

Q. That is how the big packers operate?

A. Yes, the rounds and the loins; the chuck, the rib and the plate and then they have the shank too, that would be six different pieces they make out of it, and they call that piece work and one man does this and the other does that.

Q. In this business you call that a poundage basis?

A. A poundage basis.

Q. Who came to see you first, Reed or Reed and Peterson got together?

A. Together.

Q. They said they operated in St. Louis?

A. Yes, sir.

Q. Did you know one of those men? I think Mr. Reed had just been employed in a Kansas City plant for a short while before he came to the Kaiser plant.

A. When they came to me they told me they were out of work; that Peterson had been working at Armour's and I don't know any more whether—he had a big black eye. He said a meat hook hit him in the eye but I hired the men and I don't think they boned over three or four days or a week when Mr. Smith called me at the Kansas City Dressed Beef and said this Jim Reed had worked for him. I said, "That is news to me," and I went out and called Reed to the phone to talk to Smith and they had a conversation and Reed, my understanding was, went down and talked to Smitty.

Q. What was the purpose of Smitty calling you about Reed?

A. He told me the man belonged to him and I told him I would have the man talk to him. I didn't know anything about it. The man told me he was unemployed.

[fol. 96] Q. Did you request a referral card of the War Man Power Commission with respect to these men's employment?

A. I don't believe they were required at that time, yet, I am not certain.

Q. What came of the discussion with Mr. Smith?

A. They had a discussion and Reed told Smitty that he wanted to go to work for us, he had made a contract with us and he wanted to work for himself and they seemed to part friends then.

Q. Both of those men, both Reed and Peterson had just been employed on an hourly basis by these other companies, had they not?

A. As much as I know, yes, sir.

Q. Not piece work, not a poundage basis?

Mr. Hecker: What other companies do you mean?

Mr. Smith: The Kansas City Dressed Beef and Armour.

A. Armour was probably piece work in chunks, see, where Dressed Beef was—must have been an hourly basis.

Q. In other words, Reed had just worked on an hourly basis before at Kansas City Dressed Beef, before he came to your company?

A. Yes, sir, that is right.

Q. Did he offer to bone beef for you at the rate of forty cents per hundred pounds?

A. Yes, sir.

Q. What was said with respect to the details of the arrangement? What beef was he to bone?

A. All Army beef, or if we had anything else that was rejected that would—they would bone that. When I asked him, I said "How do they do that at Smitty's?" He said Smitty had a saw down there that he cut their beef. I said, "We haven't got a saw. We couldn't even buy one." So he says, "Well, let me see the place where you have got." And he said, "That is no trouble for us. We work just with a knife, where in a big packing house

they throw them down and saw them like they do a board."

Q. There is considerable difference in the way it is done in the small packing place from the large?

A. Yes, they have a rolling table and the meat in a big [fol. 97] packing house, they have two large rolling *table*, one on one side for fore quarters and one on the other side for hind quarters. They cut this meat with two different saws. They have men on the center and they help themselves and bone it and it goes into barrels there.

Q. Did Reed and Peterson agree to bone the beef, the carcasses each day? I will state that this way: Was there an agreement that they were to bone the carcasses that you provided them each day?

A. That is right.

Q. Was that agreement to bone the carcasses furnished each day incorporated in the written contract that you made with Reed and Peterson?

A. Yes, sir, and agreed to furnish all labor, we did.

Q. How long did Reed and Peterson work with you before the agreement was reduced to writing?

A. The agreement was written up before they started to work.

Q. At whose suggestion was it put in writing?

A. At whose suggestion? I think we both suggested it. We both wanted to be protected.

Q. Do you remember whether Mr. Peterson's name appears in the body of the written contract for the boning?

A. Reed's name appeared at the top, Reed and Peterson both signed it. The reason for that was Reed wanted his name on top because he had to watch the money, and that is the way he wanted it, so he could collect the money, because he had to watch Peterson on his drinking, and he had to see that the men were paid.

Q. Reed was considered the boss by the men.

A. They were both considered boss by the men, but Reed wanted it that way so he could be the payoff man. He had to be responsible for the money for the seven or eight men who worked there.

Q. For how many weeks were Reed and Peterson the only boners who worked there in the boning vestibule?

A. They had either two or three men right off the reel, right off the start.

Q. For how long did Reed and Peterson do this boning at your plant?

A. I believe it was two and a-half months.

[fol. 98]. Q. Up until about what date?

A. Well, they went home for Christmas and New Year's and we were shut down boning almost a week on account of it, both got drunk in St. Louis and then they had a falling out and Reed went over to Kornblum's and started boning with Kornblum's on the same basis.

Q. Was the written contract ever cancelled?

A. As much as I remember, Otto Schindel took it over.

Q. Was any writing entered into between you and Reed or Peterson relative to the cancellation of your contract with them? We will get to Mr. Schindel later. Was it ever cancelled in writing?

A. I don't believe it was.

Q. Do you remember that there is a clause in the written contract providing for a two week's cancellation notice? Do you recall that was in that written contract?

A. No, I don't recall that.

Q. Was any notice given you by either Reed or Peterson that they were not going ahead with the written contract?

A. No, sir.

Q. They just didn't come back, is that correct?

A. Didn't come back.

Q. Was Mr. Schindel that you have just named one of the boners working for Reed and Peterson?

A. Yes, sir.

Q. Did you contact him or did he contact you about continuing with the boning?

A. Well, they were there, and he suggested that they go ahead on the same basis, and he had to bring up a few extra men because at the time Reed had two brothers and another friend of his there, and, of course, when he walked out, he took them all over to Kornblum's with him.

Q. Did all of the old boners quit except Schindel?

A. Except Schindel, and there was probably one or two more. Doliner was one of them. He went to work for them just before he went in the service. Doliner worked on that gang too.

Q. State whether or not the written contract that you had with Reed and Peterson required that Sam Dolinar be continued as a boner?

A. When there was no more city boning, we had to find a place for Dolinar and they hired him, I think, and I [fol. 99] think they paid him $1.50 an hour. He went on their payroll about—sometime the latter part of November, and he was with them probably a month or two when he went into the service.

Q. Up until sometime in November, Doliner was an employee of the Kaiser Packing Company?

A. That is right.

Q. You say he was paid after that time on an hourly basis by Reed?

A. By Reed, yes, sir.

Q. Reed handled the money?

A. That is right.

Q. Did you ever make any claim against Reed or Peterson for their unlawful termination of the contract?

A. No, sir, because we knew the way the men worked, that they made themselves 100 to 130 and 140 dollars a week, and they would always be broke the following Monday morning, so you couldn't come back on people like that.

Q. They didn't have any money?

A. They spent it as fast as they made it.

Q. Do you figure that you had been damaged by their walking out?

A. We were hurt, but there was nothing we could do about it.

Q. Did you enter into a written contract with Schindel?

A. Schindel should have been on that, whether he went—whether his name was on there, I couldn't say for sure.

Q. You mean his name should have gone on the sales contract, is that what you mean?

A. Yes, sir, made out on the same basis, and that is the way we kept on with Schindel then for a while.

Q. You don't remember, though, whether Schindel ever signed a written paper of any kind?

A. No, I don't.

Q. As a matter of fact, Mr. Kaiser, haven't you told our inspector that you didn't have any written contracts after this first one, because the men just came and went, and there wasn't any need for a writing?

A. I don't remember making that statement.

Q. You can't remember for sure whether you had a writing with Schindel, is that right?

[fol. 100] A. That is right.

Q. You may have had one and you may not have?

A. His name was supposed to be entered on a similar contract and he continued to do his own hiring and firing, which they do, because they expect each man to hold up his own when they all divide equal, see, and if they have any disputes between them, we didn't enter into it with them at all.

Q. You spoke about them dividing equally. Throughout the period from October, 1942, up until the present time while there have been variations in the method the boners are paid, in the main, they have shared equally the boning money, is that not true?

A. Well, now, we—they change the set-up four or five times on us in that length of time, but with Reed and Peterson, they paid their men so much an hour for whatever they were doing and they collected total at the end of the week, but they paid those men probably seventy cents an hour for picking bones and $1.00 an hour if he was worth a little more, or $1.50 he was tops, and that is the way they were working and still working with Kornblum.

Q. What do you mean, "picking bones"?

A. Reed picked his bones clean, those large rib frames.

Q. That is an operation that you have had to have done most of the time since Reed was there, is that right?

A. To keep from losing the meat, yes, sir.

Q. But Reed had his men do that work?

A. Yes, sir; and he did a nice job two and a half months.

Q. Your best arrangement was with Reed and Peterson, is that correct?

A. Yes, sir.

Q. Now, following the time that Schindel started to work for you at about the holidays, around the first of January, 1943, state whether or not the usual arrangement between the boners was for them to share evenly among them the boning money?

A. As much as I knew he did. I am not even certain. I believe Oliver Deer was in with Schindel on that, but they changed the set-up several times, and I just couldn't keep up with them at times.

Q. You mean Oliver Deer was a partner?

[fol. 101] A. He was in for a certain period, yes, sir.

Q. Did you ever have any contract with Deer and Schindel?

A. They were—only that they were working on that same basis as Reed and Peterson.

Q. It has been pretty hard for you to keep track of just who the people are you have your contract with, hasn't it, there have been so many changes?

A. They have changed, and then Hooper came in there. Hooper and Deer had it and then it was Hooper by himself.

Q. But getting back to my other question, Mr. Kaiser, usually since the time Reed and Peterson operated for you, the boners have shared the boning money on an equal basis?

Mr. Hecker: If you know.

Q. If you know.

A. Well, I couldn't say just when they did and when they didn't.

Q. They did on occasion, you know that?

A. Yes, sir; they did on occasions.

Q. How often were the boners paid?

Mr. Hecker: You mean the individual boners?

Q. I am speaking now of the boning money to the boners.

A. Every Friday afternoon they collected from Herman.

Q. When you say "they", what do you mean?

A. Whether it was one or two.

Q. There were usually one or two?

A. That is right.

Q. That you say were contracting with you, is that right?

A. That is right.

Q. They collected the money from Herman Edmondson?

A. That is right.

Q. Is he your office manager?

A. Our secretary and office manager, yes, sir.

Q. His work at the company is that of office manager, is that right?

A. Yes.

Q. He is also secretary of the company?

A. That is right.

[fol. 102] Q. The boning money was then paid on Friday afternoon?

A. Yes, sir.

Q. Has that always been the case?

A. Yes.

Q. Is that paid in cash or by check?

A. By check.

Q. State whether or not Mr. Edmondson or some other officer of the company has advanced sums of money to individual boners?

A. They go through the week and come in every night and borrow $5.00 or $10.00. They had it coming to them.

Q. Is that sum deducted from the amount paid by check?

A. Yes, sir.

Q. On Friday?

A. Yes, sir.

Q. Any time a boner wanted money, could he come and get an advance in that fashion?

A. Yes, but we usually made them go to their boss and give Herman an o. k. on it, because he was responsible for the money and Herman couldn't give them money without seeing the man that was in charge of the money. You never had any experience with that kind of men, those beef boners. Have you ever been around them?

Q. We will talk about that later. Mr. Kaiser, state whether or not it has always been a part of your contract with the boners that the boners bone the carcasses furnished to them each day?

A. Why, sure.

Q. Have they always done that by the day?

A. The number of carcasses we furnished them?

Q. Yes.

A. There are days that they would bone forty cattle and there is days they boned 100. It is according to how they felt. They came and went when they felt like it.

Q. Their obligation, as I understand it, under their contract with you was to bone as many as you furnished each day?

A. That is right.

Q. Ordinarily that is true, is it not; they would do that?

A. That is right.

[fol. 103] Q. Your cooler doesn't provide enough space to store very many days back carcasses, does it?

A. That is right. I wouldn't want too many stored, because they would dry out, because that is all shrink.

Q. The boners can operate best when the carcass is about 24 hours?

A. 24 to 48 hours, yes, sir.

Q. That is after killing; is that how you measure it?

A. After killing, yes, sir.

Q. Twenty-four to forty-eight hours?

A. That is right.

Q. That is the usual period that intervenes, is that right?

A. That is right.

Q. State whether the boners ever do any of the work of handling barrels, of weighing meat, washing barrels or of moving carcasses into the boning vestibule?

A. No, sir.

Q. That work, is all done by——

A. (Interrupting) By our men.

Q. (Continuing) —by employees of the Kaiser Company?

A. Yes.

Q. What was your arrangement with Mr. Schindel with respect to the amount of money to be paid for the boning?

A. At first it was forty cents a hundred, the same as Reed and Peterson.

Q. You stated there was a change; there was a change with Mr. Schindel?

A. Schindel from 40 to 45 and they would do a better job of boning.

Q. Do you recall when that happened?

A. No, sir, but Herman has the records down there on it.

Q. Is that several months after Schindel first——

A. (Interrupting) Oh, it might have been several months and it might have been six or eight months.

Q. And the rate was raised to what figure at that time?

A. Forty-five cents a hundred.

Q. What benefits were you to receive by that?

A. More meat off the bones.

Q. Did the men, in fact, take more meat off the bones following this new arrangement?

[fol. 104] A. For a few days or so they did a little

better, then they began getting careless and old man Gunderson came in and said he had been boning, I believe, at Delico for sausage, and I let him start picking the ribs to see what he would do, and it produced half to three-quarters of a barrel of meat a day, which made a saving for us.

Q. Under the Reed-Peterson arrangement one of their men did the rib boning; that is correct, isn't it?

A. That is right.

Q. Explain why you didn't insist on Gunderson being paid out of the boning money when he went to work on the rib boning?

A. Well, the thing was this: boners have been very hard to get since the war started. Everybody is fighting for the boners. We have all been hiring them away from each other when we would get one. Boners are a scarce article and the Army took Dolinar away from us. Reed has been in the Army now almost two years, so we tried our best to keep them there, and we tried to get the work out like it should be, but you have got to take what you get.

Q. You found boners difficult——

A. (Interrupting) To obtain, yes, sir.

Q. (Continuing) —to find.

A. Yes, sir.

Q. State whether any of these boners that you have had in the boning vestibule have ever felt any contractual obligations towards you?

Mr. Morrison: Ever felt any?

Mr. Smith: Yes. I will rephrase that.

Mr. Morrison: I think that is a little technical. It is a little hard on me anyhow.

By Mr. Smith:

Q. I will state that this way: State whether these boners ever felt any duty under the contract to stay by the contract, first of all?

Mr. Morrison: I think that would call for a conclusion——

Mr. Hecker: And not even his own——

Mr. Morrison: (Interrupting) State of mind of somebody else. It is pretty indefinite besides.

[fol. 105] Mr. Smith: I think we can get at it another way.

Q. How long did Schindel do the boning for you?

A. Oh, I would say eight or nine months, and he left and he has been back twice since working for me again. They just come in and out.

Q. Schindel was gone for two periods?

A. Two or three periods, and he is down there now with the others.

Q. When he left did he give you any notice of terminating the contract?

A. I don't believe he did. He just told us he was going to start roofing; that was in the spring.

Q. What did you do after he left?

A. Well, Frank Hooper was there, so Frank Hooper and Deer——

Q. (Interrupting) Were they two of the boners who worked along with Schindel?

A. Yes, sir.

Q. What did you say to them?

A. Well, they took it over, said they would do a good job, the same as they had been trying to do, and, of course, they get in there and they want to jerk these big cattle down and they don't want to take the small cattle. We have to take them as they come in the stockyards.

Q. They wanted to make the most money with the least work?

A. That is exactly it.

Q. Mr. Schindel came back, I understand, after he left?

A. That is right.

Q. How long was he gone the first time?

A. He has been gone practically all summer.

Q. He came back here just two or three months ago?

A. Him and Behrens were in the roofing business this summer; they worked about six months roofing houses, and now the weather gets cold, they come back.

Q. And they came back and are boning now in your establishment?

A. That is right.

Q. Did Schindel obtain his old status as the contractor with you when he came back?

[fol. 106] A. No, sir.

Q. Whom do you have your contract with now?

A. Frank Hooper.

Q. You said it was first with Hooper and Deer?

A. And Deer.

Q. Now Mr. Deer is gone?

A. Mr. Deer left for a while and is back again now. Mr. Deer was in jail for about a week, and when he came back Mr. Hooper had it.

Q. Mr. Hooper has what you call the contract now?

A. Yes, sir.

Q. You have had then as many as six or seven different sets of boners?

A. I would say five or six times the set has been changed.

Q. When Mr. Schindel came back, did he have a conversation with you?

A. No, sir.

Q. He just went to work?

A. I never had anything to do with hiring any of them men they worked, because there were a certain number of them related, and three of them in the service. They were all related, and if you look *look* at one of them the rest gets mad, so they have always done their hiring and firing in that room, and I have been crying when the meat didn't come clean.

Q. Now, when Mr. Deer left, did he just give up and go or did he give you some kind of notice?

A. Well, the police beat hell out of him, and that is the reason he didn't show up for about a week.

Q. Mr. Deer came back and he is with you now?

A. He is back there again, yes, sir.

Q. Do you happen to know whether he is with you on a contract basis or is he an employee of Hooper?

A. I know that Hooper was working at least a month or six weeks by himself, then I think they were going to splitting again, but I am not sure. They go down to 1717 West 9th Street. That is a big saloon. That is where they do their transacting. They have their business office down there; Kansas City Dressed Beef and Armour men do their business down there, and they know what each and every one of them makes. They own about two-thirds of that place, but they never get possession of it.

[fol. 107] Q. As I understand it, you are not sure at the present time whether it is Mr. Hooper that has the contractual obligation to you or whether it is Hooper and Deer?

A. Mr. Hooper gets the check, Frank.

Q. Is it made out to Mr. Hooper?

A. It is Frank Hooper Boning Company.

Q. I see.

A. But how they split when they leave, I don't know.

Q. Have you had any written contract with any boners since Reed and Peterson?

A. No, sir.

Q. Has there been a written contract in the last three or four months?

A. With Hooper, yes, sir.

Q. Is that contract with Hooper alone or was it with Hooper and Deer?

A. There was one Hooper and Deer ahead of that, then Hooper took it over for himself.

Q. The written contract, is that drawn up with Hooper and Deer's name?

A. One was Hooper and Deer, and then one made after that for just Hooper.

Q. Have you boners ever paid any rent for the use of your boning vestibule?

A. Yes, sir.

Q. Did Mr. Reed and Peterson pay any rent?

A. No, sir.

Q. Did Schindel ever pay any rent?

A. No, sir.

Q. You mean very recently there was a rental arrangement, is that right?

A. Yes, sir.

Q. Explain when that originated, who it was with and what rental agreed to.

A. It was with Frank Hooper for $100.00 a month.

Q. Did that originate just a month or two ago?

A. It has been—it must be four or five months ago.

Q. This was after Deer had left, was it not?

A. Yes.

Q. And before Deer had returned?

A. Along in there, yes, sir.

Q. That will help fix the time, is that correct, or not?

[fol. 108] A. I haven't got the exact date.

Q. Several months ago. How many months was that $100.00 a month rental actually made?

A. I couldn't say just how many months.

Q. Just to the best of your knowledge, was it paid one month, two months?

A. Two or three months, to the best of my knowledge.

Q. It isn't being paid at the present time, is that right?

[Since giving my oral testimony herein, I have checked the matter of the $100.00 payment with Mr. Edmondson and have found out I was in error and that no rent has yet been paid by Hooper.

Paul O. Kaiser.]

A. Yes, sir, it is.

Q. It is being paid currently?

A. Yes, sir.

Q. It has been paid for the last two or three months?

A. As close as I can say, yes, sir.

Q. How is that paid? Is it deducted from the boning money?

A. Deducted from the boning money, yes, sir.

Q. At what rate are the boners employed now?

A. At what rate?

Q. What rate are they paid at the present time?

A. For their poundage, you mean?

Q. That is correct.

A. Still 45.

Q. That hasn't been increased in the last few weeks?

A. No, sir, they have been demanding a raise but we haven't been able to see we could do it for them. I understand that Campbell Soup is paying them 50 cents, and other people have another system of working it down below; they pay them on a basis so much meat per hour, then any over that, overage over that they pay them on the basis again. Everybody has a different set-up down there.

Q. Did your first arrangement with Mr. Hooper include this $100.00 per month rental?

A. Yes, sir.

Q. But your first arrangement with Hooper and Deer did not?

A. It did not; that is right, did not.

[fol. 109] Q. When did you make this arrangement for rental? Was it the same week that Deer left?

A. Yes, sir.

Q. Did Mr. Hooper volunteer to pay the $100.00 a month or what gave rise to your charging rental for that?

A. Well, Hooper figured that he could handle the men on the basis the way Jim Reed did. Jim Reed took the total check and paid the men so much an hour for what they could produce, and there is where the talk we had on the rental basis.

Q. He paid his men on an hourly basis for a little while, did he not?

A. That is right.

Q. But that fell through, and now they are all sharing evenly again?

A. All sharing equally.

Q. State whether or not, if you know, Reed and Peterson belonged to the union?

A. Yes, sir, they all belong to the CIO.

Q. State whether or not there was an occasion where you personally insisted that Reed and Peterson join the union?

A. I didn't insist that they would, but the CIO steward wouldn't let them work unless they did. They had Mr. Brown over from the Kornblum plant, and they either had to join the CIO or they couldn't work.

Q. Speaking of Reed and Peterson and Schindel and Hooper working, state whether or not these men whom you say have had the contracts with you, state whether or not they worked full time and did full jobs right along with the other boners in the boning vestibule?

A. Yes, sir, they all worked together.

Q. As a matter of fact, ordinarily the man with whom you say you had a contract was one of the better boners and put out as much or more production than the other boners?

A. That is right, a man like Reed would do as much as two ordinary men.

Q. If such a man doing the same kind of work were elsewhere in your plant, such as in the killing room, you would call him a working foreman, would you not?

Mr. Morrison: I object to that as calling for a conclusion.

Mr. Hecker: Argumentative.

[fol. 110] Mr. Morrison: Immmaterial.

Mr. Smith: Well, I will withdraw that.

Mr. Morrison: I think that is a matter of argument.

Mr. Smith: Yes, I think that is unimportant.

By Mr. Smith:

Q. What record has the Kaiser Packing Company kept of payments made to boners?

A. To my knowledge, Mr. Edmondson has a full record of them. I will tell you, why, he has about twelve records he keeps there. Herman has a record that he has to give to the B.A.E., the B.A.I., he has to furnish all this weight to the government.

Q. I think we can simplify that: what I want to know is what kind of a record do you keep, just a record of the single weekly payment made to the individual with whom you have the boning contract?

A. That would be on his check every week.

Q. Does the company have any record of the division of the money or payment of money to individual boners?

A. No, sir, we wouldn't have that.

Q. State whether or not the company does maintain or has kept a record of, payroll record of hours worked or sums paid to certain occasional workers and workers by the day that the company has employed.

A. Well, Edmondson has almost a complete record of everybody. There has been a few casuals, as we call them, come in and work a few hours or a day, that Herman paid them in cash, something like that.

Q. That is, such labor is shown on petty cash vouchers in that case?

A. That is right.

Q. There are individuals of that type whose names do not appear on payroll records?

A. There are a few there. There have been a few there, yes, sir.

Q. Mr. Kaiser, you have stated that you did not have any boning done in the boning vestibule, any of this regular beef boning, except for the Rutherford Company, and then an occasional carcass—I think you said maybe twelve a week, that were also boned for Rutherford Company, but that part wasn't Government work, is that correct?

[fol. 111] A. That is right, out of reject cattle.

Q. Now, in addition to that, Mr. Kaiser, were there not

occasions when there was beef boning done for the city trade?

A. Unless I might have given a few barrels of Army meat to processors by request of Army officials. They had told us there for a while when Rutherford was shut down to supply them people in St. Louis with meat on Army orders, with Army stamp all the way through.

Q. Such meat as you are talking about now was done in the boning vestibule just like the other boning, is that right?

A. Yes, sir, all but government products for government houses.

Q. State whether or not you didn't have occasion to take one of the boners who worked in the boning room and employ him on an hourly basis for some special boning for the city trade?

A. When Rutherford was short pork shoulders, pork up there, and we had to pull a few boners in there; even them beef boners boned some shoulders for us, for Rutherford's Army officers.

Q. I call your attention to the name, Ed Cunningham. State whether or not he worked as a boner on frequent occasions?

A. Ed Cunningham came in a few times and he picked on some bones when Gunderson was on a drunk for two or three days. He came in one or two nights and worked on a few of them bones, Ed Cunningham.

Q. You paid him on $1.00 an hour basis, did you not, for that work?

A. Something like that, yes, sir.

Q. And he was an employee of the Kaiser Packing Company?

A. That is right, on those ribs.

Q. You spoke about the shoulder boning. Explain how that was done.

A. Pork shoulders, they were brought from Armour's Cudahy's, and the pork shoulders were brought in in barrels and boxes, put on the table and the skin taken off, the bone removed and several glands taken out of the shoulder. The Army man seen that work done, and that went [fol. 112] into Rutherford's, when they had this beef and pork product they were making up there in the spring.

Q. Who did that boning?

A. Well, there were times we had several men come down from Royal, worked two or three evenings with the Army man and Government man there to watch them bone.

Q. There were also times these boners who did your other boning did that kind of work?

A. Yes, there was sometimes they worked on it too.

Q. You paid them on an hourly basis for such work?

A. That is right, for such work.

Q. You had also boning for the city, did you not? Explain, if you can, what a petty cash voucher means where it says, "Boned for City at two, @ $1.50, $3.00, Otto".

A. I will tell you what a few of those are. We had some two or three real sloppy cattle that nobody would use, only a few of these little sausage factories in town that haven't government inspection, and we marked a few of those "city" and let them have them.

Q. Who is Otto?

A. That must be Otto Schindel.

Q. Who is Pete? Is that Peter Medved?

A. No, he doesn't do any boning. Is it marked "Pete"?

Q. P-e-t-e (spelling), Pete.

A. What would be the amount of that be?

Q. $3.00; boned for city, $3.00, Pete.

A. I think that $3.00 is those railroad ties we bought for a fence. I have heard about them a dozen times. Pete carried them out to the railroad yards, and Herman give him $3.00 for that. I heard about them three times. It was for a fence.

Q. Explain, if you can, this petty cash entry, "boned for city, 9, at $1.50, $13.50, Otto and Pete."

A. It would be Otto Schindel, but who the Pete would be; Pete Jaksic don't do any boning. He is no butcher. Those men come and go. You just can't remember the names of them.

Q. Well, Mr. Kaiser, state whether or not this may be the case that Peter Medved was paid that money, then he in turn paid various individuals who actually did the boning?

A. That might be that Herman gave Pete the money to [fol. 113] pay them fellows that, but Peter Medved wouldn't get the money, only hand the money to them.

Q. Just so this is clear in the record, I believe you

stated that there have been occasions where for city trade and other special boning, you have paid directly various individuals, including the boners who do the regular boning in the boning vestibule by the hour for certain special boning, is that correct?

A. Special boning. See here, Pete has eight or ten cattle that have been hanging on the rail for a week, bruised pretty bad or big pieces cut out for being bruised, and those are the ones the Army rejects; they won't take it because it don't look good to them, and Pete might go to work and make a yellow ticket on nine of them out there to show, and make a ticket and take it into Herman and bring it out to them. That is what it might be, to Otto Schindel, but Pete made the ticket on it; Otto—so Herman has a record in there of it, see.

Q. For such work as that, Mr. Kaiser, you consider these boners as your employees, do you not?

A. For those certain jobs, yes, sir.

Q. The special boning we have just been talking about, these men are your employees for that work?

A. They would be for that particular job, yes, sir, but they wouldn't stay there for a week for $9.00 or $10.00. They would want the big end of the money. That is an accommodation. They don't even care to do it for us. That is just an accommodation.

Q. All of the boners who work in the boning room have done that kind of special work on occasion, have they not?

A. Yes, sir.

Q. So all of the boners in the boning room have been your employees part of the time, at least, have they not?

A. I would say maybe one hour a week.

Q. On an average?

A. On an average of one hour a week.

Q. It takes an hour to bone a carcass, is that right?

A. A good boner can bone two an hour; a good fast man can bone two an hour.

Q. Mr. Kaiser, where a boner has wanted a job boning at the Kaiser plant, likely as not he has come to you first, has he not?

[fol. 114] A. Yes, sir, he comes to me.

Q. You have talked to him about the job on occasions, have you not?

A. No, sir, I always—when they come in asking for a

job, "What kind of work have you been doing?" "Beef boning". "You have to talk in there". If they need somebody, I have nothing to do with it.

Q. Mr. Gunderson came to you and told you he had done some boning.

A. I asked if they wanted Gunderson, and they said they didn't want him, not an old man like him, so I took him and saved some money inside the cooler. That is where I put him to work.

Q. You have recommended boners to the contractors, have you not?

A. There is very few come to me. They meet at the beer joint. That is where they do their hiring and firing. If they get drunk they hire each other down on the job at the saloon.

Q. You have a very wide acquaintance, do you not, among people in the packing world?

A. I have only been down there forty-seven years.

Q. Therefore, a number of these boners have come to you first before they have gone to work in the boning vestibule, have they not?

A. No, they all know—practically all of them know down there who to see about a job. They go to these men, because they know they are the ones who do the hiring and firing in that department.

Q. State, if you know, Mr. Kaiser, whether these boners that are currently employed in the boning vestibule, and that have been employed in the past in the boning vestibule have, in the main, each of them, worked at other plants in the Kansas City area doing boning?

A. I will tell you what they do, now: There is three of them goes over to Armour's every night after they leave at three-thirty, and work at Armour's until ten or eleven at night.

Q. Is there a boner by the name of Oliver Williams in your boning vestibule?

A. He is working today, hasn't been there for ten days, [fol. 115] and he works out at the Blond Meat Company. They just come and go, work a day or two here; they are just floaters, most of them.

Q. State whether you know whether Oliver Williams has not also worked at a number of Kansas City plants under varying conditions or arrangements doing boning.

A. Well, I never—naturally, if he worked at Kornblum's and at Kansas City Dressed Beef and Armours, he would be under three different set-ups, and ours would be the fourth, and he works out here at 31st and Prospect under another set-up; that would be five different set-ups.

Q. Did he work for the U. S. Packing doing boning?

A. Yes, sir, he worked for U. S. Packing doing boning.

Q. As a matter of fact, and this is what I am getting at, the type of laborer, type of individual that works as a boner is more or less the floater type, is he not? He has worked for different companies, and even goes from city to city?

A. They have gone from town to town. Reed and Patterson came in from St. Louis, and I don't know, I will tell you what their work is. The beef boning in the past has always been a seasonable occupation. You take in July, August, September and October, that is when the big packers used to do their heavy boning. You have heard of that, Mr. Morrison? They do their heavy boning after their big runs comes in. If Kansas City don't have a bunch of cattle come in, they would go to Oklahoma, Texas and the packing houses, and they bone. Then in the winter they come back.

Q. State, if you know, whether Otto Schindel ever worked as a contractor for any other company.

A. I couldn't say that.

Q. State, if you know, whether either Deer or Hooper ever worked as a contractor for any other company.

A. I couldn't tell you that.

Q. State, if you know, whether any of those men ever worked as contractors for other companies while they were working at your plant?

A. I know they were at the Reitz Meat Company. I don't know what their arrangement was. They boned sheep down there and used to bone sheep down on St. Louis Avenue and State Line.

[fol. 116] Q. You are not acquainted with the details of the arrangements at these different places?

A. No, sir. They went down and boned sheep, I think, by the head, and they do the same thing at the big packing houses.

Q. I believe you have stated, Mr. Kaiser, that in about March of 1943, the Rutherford Corporation became your customer for the first time?

A. That is right.
Q. Is that correct?
A. Yes.
Q. Beginning on about March——
A. (Interrupting) Excuse me. Before that, we had some meat to sell; the surplus that Stokley was slowing up, they had two or three cars here in the cooler, and the Kansas City people brought pressure through the Army on us to release some of this Stokley meat to them—that is those people I mentioned, and I think Rutherford came in and they got a couple or two or three truckloads.
Q. That was a short while before March of 1943?
A. Yes, it goes on record we did a little business with them.
Q. Beginning in March, 1943, and continuing up to the present time, has the Rutherford Corporation received in excess of 90% of the products of your company throughout that period or has it varied, and if so, how has it varied?
A. Well, the only time it would have varied a little there was when they were making a change of equipment there for two or three weeks; that we put some in the freezer, and the Kansas City Dressed Beef got two or three week's supply of meat and it was shipped to Richmond, Virginia to the Virginia Food Products.
Q. That was but for a two or three week's period?
A. Yes.
Q. When did that period come?
A. Last spring, when they went from beef and pork hash back to the chili order again, see.
Q. Except for that two or three weeks' period, did the Rutherford Company receive nearly all of your production throughout the entire period from March, 1943 until the present time?
[fol. 117] A. Yes, sir.
Q. Did there occur a transfer in the ownership of the stock in the Kaiser Company on about March 15, 1943?
A. Yes, sir.
Q. What was the nature of such transfer?
A. You say March 15, 1943?
Q. Yes.
A. That was between the 6th and the 15th of March. They bought Mr. Lionel Benjamin out. He owned fifty-one percent of the stock.

Q. You mean the Rutherford Corporation bought fifty-one percent of the stock?

A. He had fifty-one and I had forty-nine.

Q. That was effected in early March of 1943?

A. That is right.

Q. Will you explain the reason, if you know, why the Rutherford Company made that stock purchase?

A. Well, I will tell you the way it happened: Mr. Benjamin was losing some money in the plant, and he was going to sell the plant to the American Meat Company, that is, his fifty-one percent to the American Meat Company. Well, I talked to Harold Feinberg out at the Royal Food Products, and he said, "Well, I will tell you, I think you might be interested in the Rutherford people, because they are having trouble getting enough meat from the Kansas City Dressed Beef Company." I had talked to several other people too trying to sell this stock, because I didn't want to be hooked up with the American Meat, so when I walked in and talked with Mr. Van Voorst and asked him if he knew anybody that would be interested in buying Mr. Benjamin out, well, he says, "I am having trouble getting meat and you want to change partners? I believe we might be interested, but we will talk to you in a day or two." And that is the way the deal was made. They couldn't get meat and we had meat and we needed a new partner, so we took the Rutherford Food Corporation on at that time.

Q. Your testimony is that the outstanding reason why the stock was purchased by the Rutherford Company was to assure them of a constant supply of boned meat or beef?

[fol. 118] A. Yes, sir.

Q. Is that used in chili by the Rutherford Company?

A. All Army products—they had these Army contracts that had to be filled, and they were behind on them.

Q. Was that Government beef?

A. Every bit of it Government product.

Q. Now, did there occur a lease on your premises to the Rutherford Food Corporation on or about July 1, 1943?

A. Yes, sir.

Q. State, if you know, what the purpose of the Rutherford Company was in leasing your premises.

A. Well, they figured by leasing it, maybe it would

work out better for them, and then they sold me the offal and I disposed of the offal, because they couldn't take—they had no place for only beef, and I had to sell the other stuff around the city or wherever I could find a place for it.

Q. What was the financial status of the Kaiser Company prior to the spring of 1943? Had the company been losing money or doing well?

A. We weren't doing so good, because beef at the O. P. A. ceiling price of $17.40 was costing from twenty-one to twenty-two cents a pound, so we didn't—we weren't doing so good.

Q. In what way did the actual operation of the plant change beginning July 1, 1943? In what way did it change? What change in personnel and change in authority, etc. occurred as of that date?

A. Well, practically no change in authority, because I run the plant there, the same as I have been running it right along.

Q. Were the employees the same as before?

A. Well, I had a few kept on and the rest were put on the Rutherford payroll there at the plant.

Q. There were a few that you kept on your payroll?

A. Yes.

Q. Were those the ones that worked in connection with the offal and the tank house, that type of personnel?

A. Yes, sir.

Q. How many continued on your payroll?

A. Either five or six.

Q. You had employed there about forty employees altogether?

[fol. 119] A. Thirty-five to forty, yes, sir.

Q. State whether or not, except for these five, the additional employees were paid directly by the Rutherford Food Company, or were they paid by the Kaiser checks?

A. By Kaiser checks on the Kaw Valley State Bank. That was kept in the Kaw Valley State Bank for the Kaiser plant, that account, not on the Rutherford account, but on the Kaiser account at the Kaw Valley State Bank. That is where the payroll was handled.

Q. Was your salary paid by the Rutherford Corporation?

A. My salary came out of the lease and sales of my offal and stuff like that there.

Q. In other words, it was not paid directly by the Rutherford Corporation?

A. No, sir, I didn't receive a Rutherford check.

Q. Your salaries were classed with these five employees you talk about?

A. That is right.

Q. That was part of your business?

A. That is right.

Q. What monthly rental were you paid for the plant?

A. $1500.

Q. In what way was the offal and other by-products handled?

A. I bought the offal at approximately a cent under ceiling price.

Q. From the Rutherford Company?

A. That is right.

Q. In that period the Rutherford Company purchased the cattle themselves?

A. That is right.

Q. And through the period starting July 1, 1943 and for some months thereafter, you did not sell any boned beef to the Rutherford Company, is that correct?

A. What date?

Q. Beginning July 1, 1943, and continuing for several months.

A. They got their steady supply of beef.

Q. But it was not sold to the Rutherford Corporation by the Kaiser Company in that period?

A. Not when they were in, no, sir.

[fol. 120] Q. They were boning their own?

A. Their own beef.

Q. Their own beef?

A. That is right.

Q. They sold their offal to you?

A. They had no place to utilize livers, tongues and hearts up there, so I sold that.

Mr. Hecker: You got the tenderloins, didn't you?

A. Yes, tenders, fat and bones.

Q. What additional employees came to the Kaiser plant beginning about this time? I think you have already

stated that Mr. Askins a short while before this came to the Kaiser plant?

A. Yes, sir.

Q. He was always on the Rutherford payroll?

A. Yes, sir.

Q. And he now is on the Rutherford payroll?

A. Still is.

Q. How about Mr. VanVoorst, what proportion of his time has been spent at the Kaiser plant beginning July 1, 1943?

A. Oh, he spent sometime there, not a lot. He is just in and out.

Q. Did he spend as much as two or three days a week on the average in the months immediately following July 1, 1943?

A. Oh, he probably would average that much time there.

Q. You frequently consulted with Mr. VanVoorst, relating to the operation of the business?

A. Yes, sir. When they were paying for them cattle, he was a lot more interested than when it was the other way.

Q. State whether or not you still frequently consult with Mr. VanVoorst with respect to the conduct of the business?

A. I have no occasion to talk to Mr. VanVoorst now on the cattle, because we are back in the swing where I carry all responsibility myself.

Q. I think you can answer that question directly. State whether you still consult with Mr. VanVoorst relative to your business.

A. No, sir.

Q. Have you consulted with him in the past thirty days?

[fol. 121] A. No, sir.

Q. With reference to your business?

A. No, sir.

Q. Have you consulted with him in the past ninety days with reference to your business?

A. It was back in about June or July.

Q. State whether or not Mr. Gee, who is bookkeeper or auditor at the Rutherford Corporation, does work at the current time at your plant.

A. He helps Mr. Edmondson on our books and is paid for that by the Kaiser Packing Company for what work he does for us.

Q. Is he paid at the rate of $10.00 a week for that work?

A. Some of that, yes, sir.

Q. Is that work done evenings?

A. No, sir. He will come down during the day maybe for an hour.

Q. He assists Mr. Edmondson in the keeping of the books?

A. They have a bunch of records to get out there and Herman has about ten to twelve different sets of records that he has to keep on all this meat going to the Government, records to the B.A.I., B.A.E. and all; full records has to be kept on all of that, a lot of Government reports that he has to take care of there, and Mr. Gee has helped him on them.

Q. State whether Mr. Gee first started to work with Mr. Edmondson on these records, if you know.

A. Well, when Mr. Gee came in there, when Rutherford came in there, Gee started helping Herman there, and since June or July, he has continued helping Herman on these books of his to help keep them up.

Q. You mean since June or July of 1943?

A. 1944, but he helped him since Rutherford's first came in there.

Q. Since June or July, 1943, is that right?

A. No, since March of 1943, when Rutherford's came in.

Q. I see; then for the entire——

A. (Interrupting) He was watching the books for Rutherford.

Q. He has done work at the Kaiser plant then continuously since March of 1943, is that correct?

[fol. 122] A. Yes, him and Mr. Askins were watching Rutherford's interests down there. That is what they were down there for.

Q. You have identified the lease that was entered into on July 1, 1943. For what period of months was that lease effective, to what date?

A. I can't remember the exact date.

Mr. Hecker: You mean by its terms or actually?

Q. For what actual period was it in effect? When did the lease terminate in fact? State as nearly as you can remember.

A. It run until June or July—the last of May or June of this year.

Q. To about May or June of this year?

A. Yes.

Q. By its terms was it to run for a period of twelve months?

A. I don't think there was any certain number of months; I am not sure now.

Q. But you say now that, in fact, it did end in May or June of 1944?

A. Yes, sir.

Q. What caused it to terminate? Was there a written termination agreement entered into?

A. Well, the cattle were getting to a point—getting higher and it has been pretty hard to work it out on the other end, and I figured we should go in and try to get our subsidy on these cattle when we terminated there in May or June.

Q. Is that a defense supplies corporation subsidy that you refer to?

A. Yes.

Q. Federal subsidy? It was in order to get that subsidy that you terminated the lease; that was the purpose of it, is that correct?

A. Well, the cattle were not coming like they should. They are always scarce along that period and decided that that would be the thing to do.

Q. But your chief interest was in getting the subsidy, getting the government subsidy?

A. Yes, sir.

[fol. 123] Q. You knew that couldn't be gotten by a slaughterer who also was a processor, is that right?

A. Well, we had figured on a subsidy when we started and we had talked to several people about it at the first of the year. I believe you asked me once about the subsidy, didn't you, Mr. Johnson, why we didn't put in for subsidy, and we have been putting it off. They have been carrying the load at the chili plant there. Now, when the thing changes and this beef goes up in price, they have a contract with the Government for so much

chili at so much money, and it was making kind of a hard drag on them all through the spring and summer to produce beef at 17.40, and the Army officials even wanted to lower the price on their chili, because they knew Rutherford's were getting a subsidy, and when Mr. VanVoorst mentioned that to me, I said, "If the Army is sure you are getting a subsidy, that would be just the thing to do is to cut off and I will work the plant for myself.

Q. At that time was your permit transferred back to Kaiser Company?

A. Yes, sir, by the B.A.I. that you are talking about?

Q. Yes, Had that permit been held by Rutherford for this ten or eleven months' period?

A. Yes, it had for that period.

Q. Beginning then in May or June of 1944, were you back on the same basis that you had been in the month of April, 1943; were you selling boned beef to Rutherford?

A. Yes, sir.

Q. Was that price $17.40?

A. It has always been $17.40, yes, sir. Another reason that worked on me and *prayed* on me down there was that all the other firms down there had leased out and went back, Kansas City Dressed Beef went back, Kansas City Dressed Beef done it, they got their subsidy, so it was nothing new for me to try to get it. If Kansas City Dressed Beef could get it, there was no reason why I shouldn't try to get it. They transferred back and forth two or three times, and I thought if they could, we could.

Q. State whether there was any resale of the stock which was purchased by the Rutherford Food Corporation in the summer or fall of 1944.

A. I bought the stock from Rutherford Food Corporation.

[fol. 124] Q. On what date you are speaking now of these fifty-one shares?

A. Yes.

Q. Upon what date did you repurchase that stock?

A. Sometime in June.

Q. Would you remember if June 19, 1944 was the date?

A. That is about the date, yes, sir.

Q. How was the purchase of the stock *affected;* what did you pay for it? Was there a written agreement? Give us the details.

A. Well, I bought the stock for $1,000.

Mr. Morrison: You are familiar with the debentures too, aren't you, Mr. Smith?

Mr. Smith: Yes, I will get to those in just a minute.

Q. State, if you know, how much Mr. Benjamin received for the sale of the same stock a year before.

A. Mr. Benjamin received $20,000.

Q. Did you pay this $1,000 in cash?

Mr. Morrison: Pardon me. That was for the stock and debentures too?

A. Yes, sir.

Mr. Morrison: The combination?

A. Yes, sir.

By Mr. Smith:

Q. The $20,000 was not for the stock alone?

A. They bought it from Mr. Benjamin, stock and debentures for $20,000.

Q. You are certain the $20,000 went for more than the stock, included the debentures, is that correct?

A. You mean the sales of Benjamin to Rutherford?

Q. Yes.

A. It was $20,000.

Q. That covered more than the fifty-one shares of stock? It included the debentures?

A. Fifty-one percent and the debentures.

Q. And the consideration was $20,000?

A. The consideration was $20,000.

Q. Now, state in what manner you paid the Rutherford Food Corporation $1,000 for the fifty-one shares of stock.

[fol. 125] A. I gave them $1,000 cash for it.

Q. Upon what date did you make that payment; was that on June 19, 1944?

A. About that time, yes, sir.

Q. In the month of June, 1944, you paid $1,000 cash for the fifty-one shares of stock?

A. Yes, sir.

Q. So this entirely clear, that is for the stock alone, not including the debentures?

A. That is right.

Q. Did you get a receipt for that payment?

A. Yes, sir.

Q. And it was by cash and not by check?

A. By cash.

Mr. Hecker: To refresh your recollection, did you give him a check and you took that up later?

A. I gave them a check I took up later. I gave them a check but took it up later.

Q. Let's get the record clear on that. You paid a check to the Rutherford Food Corporation in June, 1944?

A. And they held the check; like I told Mr. Johnson at the time he asked me about it, I was a little financially embarrassed right there and they held the check for sometime, but I gave $1,000 for it and they returned the check.

Q. You paid $1,000 cash at a later time and the check was returned, is that right?

A. Yes, sir.

Q. Whom was this transaction with, Mr. VanVoorst, representing the Rutherford Company?

A. Yes, sir.

Q. You handed him the check personally?

A. Yes.

Q. In June of 1944?

A. That is right.

Q. State, if you can, what month you received the return of that check.

A. Several months later.

Q. State, if you remember, whether it was after October 11, 1944.

A. I couldn't tell you the exact date on it.

Q. Was it in the fall of 1944?

[fol. 126] A. Yes, sir.

Q. The check was never cashed, is that correct?

A. That is right.

Q. You received your original check back for the $1,000 cash?

A. Yes, sir.

Q. You can't indentify the date you paid the cash to Mr. VanVoorst?

A. No, sir, I couldn't. I got a receipt for the $1,000 cash.

Q. When do you understand that your purchase of the stock actually took place? Was that in the fall of 1944 or in June of 1944?

A. The sale would be in June.

Q. Was there any writing in connection with that sale? Was there any kind of writing evidencing the sale?

A. Certainly.

Q. What sort of writing?

A. Well, the regular procedure was went through on the transfer.

Q. That was done in the month of June, 1944?

A. That is right.

Q. As a matter of fact, Mr. Kaiser, wasn't this whole thing just left tentatively to see whether or not you could get the subsidy under this new arrangement?

A. No, sir. We are going to get that subsidy regardless of how I get it. We are going to go to Washington. I don't know how Dressed beef got it but——

Q. (Interrupting) We are getting off the subject a little. In June, 1944, you insist the sale of the stock to you was final?

A. That is right.

Q. And all that wasn't accomplished was the actual payment of the $1,000?

A. That is right.

Q. That was done in the fall of 1944?

A. That is right.

Q. You had a conversation with Mr. John W. Johnson, Inspector for the Department of Labor in October, I think it was, of 1944?

A. That is right.

Q. I think he talked to you about some of these matters we talked to you about?

[fol. 127] A. He did.

Q. Didn't you tell Mr. Johnson that you weren't quite sure whether you had bought the stock back or not at that time?

A. Well, here was what happened: Mr. Johnson come in and I was rushing up around the plant there, and he got out of his car and walked up to me and asked me and I said, "Well, now"—when he asked me the question right off, I said, "Well, now, I don't know whether I should give you that exact amount or not." You asked me if I bought it and I said, "Yes, sir." And then you said, "What is the amount?" And I said, "Well, now, I don't know whether that is important for me to say right now or not." That is the remark I made.

Q. You told Mr. Johnson that you had bought it back?

A. Yes, sir, I told him I had bought it back.

Q. You didn't tell him you weren't sure whether you had bought it back or not?

A. I didn't mean it that way. I told Mr. Johnson I bought it and he wanted to know what the amount was, and I said, "Well, I don't know; I think that is a little bit personal." And that is all I said. I thought that was a little personal and I didn't think I had to answer that. I didn't mean to be——

Q. At the time that you bought this stock back, Mr. Kaiser, did you immediately get on the same basis of operation as you had been on in the spring of 1943, before the Rutherford Company lease was signed?

A. Yes.

Q. How did you handle a settlement of the accounts between the company at that time? Was there money in bank accounts belonging to the Rutherford Company and was there property involved belonging to the Rutherford Company on the Kaiser premises?

A. There was stock and no equipment but just stock in the freezer and things like that.

Q. By "stock" you mean cattle? Is that what you mean by "stock" now?

A. Stock in the cooler, some stock in the cooler and stock in the freezer, something like that.

Q. I see, and was there also money in bank accounts?

A. Yes, money in the bank accounts, yes, sir.

[fol. 128] Q. Was that all credited to the Rutherford Company?

A. That was credited to Rutherford Company, yes, sir.

Q. In other words, did you buy such stock from the Rutherford Company in the spring or summer of 1944?

A. We bought the freezer stock.

Q. How was its value computed?

A. Well, we figured the freezer stock at what it was offered for on the market. We had some part there. The offer was as low as a nickel a pound. I finally got as much as twelve and thirteen cents for that stock by holding it, such as cheek meat. We had liver. We was offered eighteen for liver, and I told them—in another three months we got twenty-three for the livers, so I just kind of played it and happened to hit it pretty lucky in there.

Q. You made some profit on the resale?

A. Yes, sir.

Q. Of those items?

A. Yes, sir, our books will show those figures and those costs.

Q. State whether or not you know of an entry on your books of June 30, 1944, showing a credit to the Rutherford Corporation of $41,000, which was the sum that resulted in the property adjustment between the companies?

A. Yes, sir, that was it.

Q. State, if you can, what proportion of that $41,000 went to stock?

A. Well, as much as I can remember, half the stock, half of it was in stock and the rest in money. We have about $20,000 worth of frozen products up here at the U. S. Cold Storage.

Q. And the remainder was in money, in two bank accounts?

A. Yes, sir.

Q. Those were bank accounts that were within your control, were they not?

A. Well, the Kaw Valley and the Merchants. The Merchants was in control of Rutherford's, so we didn't keep—the big money was all up at the Merchants' Bank, but the Kaw Valley Bank was just the payroll account only see.

Q. You had control of the Kaw Valley?

A. Yes, but there was only about the amount of our [fol. 129] weekly payroll, was all that was kept at the Kaw Valley, but the cattle, stockyards was bought and paid for through the checking account at the Merchants Bank.

Q. And the Rutherford payroll was on that?

A. Yes.

Q. This twenty some thousand dollars, was that total in the balances of both accounts or how do you arrive at that figure?

A. Well, that was the stock we had on hand between that and cash in the bank.

Q. Both banks or just——

A. (Interrupting) Just the one bank, Merchants Bank, and the stock, frozen product in the U. S. Cold Storage.

Q. In other words, the balance in the Merchants Bank was somewhat in excess of $20,000 at that time?

A. That is right.

Q. That was about half of the $41,000?

A. Yes.

Q. Mr. Kaiser, if it were discovered that a more profitable working arrangement with the Rutherford Corporation than you now have were possible through the Rutherford Company coming back in, as they did under the lease, you would have no objection to going back to that arrangement?

A. I don't believe I would.

Q. You mean you don't believe you would go back to that arrangement?

A. I don't believe I would, no, sir.

Q. Even if it were a more profitable arrangement?

A. I would sooner go through this other way than work with them, if possible.

Q. You have not yet obtained the Defense Supplies Corporation's subsidy?

A. No, sir.

Q. Is that a subsidy of eighty cents per hundred pounds on the hoof?

A. That is right.

Q. Is the difficulty that has stood in the way of your obtaining it the fact that there was this association between the two companies?

A. That is the way it looks now, yes, sir.

Q. Do you know whether, before June 19, 1944 and [fol. 130] earlier that same month, there was a transfer of the stock in the Kaiser Company owned by the Rutherford Company, from the Rutherford Corporation to Mr. VanVoorst? I am speaking now about this fifty-one percent that we have referred to. Was that transferred in early June of 1944 to Mr. VanVoorst?

A. I really couldn't tell you.

Q. Do you recall any conversations where that course of action was contemplated?

A. No, I don't.

Q. You don't know whether it was considered at that time that possibly the transfer of the stock to Mr. VanVoorst would leave the way open to the obtaining of this government subsidy?

A. No, I couldn't say.

Q. Do you recall advice from the Defense Supplies Corporation to the effect that that wasn't good enough? It

couldn't be owned by the Rutherford Corporation officers? You don't recall that subject——

A. (Interrupting) No, not for sure. I know that Herman talked to Mr. Gee way back in January, almost a year ago. He talked to Mr. Gee.

Q. Part of this sale of stock back to you, part of this arrangement was to involve your repurchase of these debentures we spoke about before, was it not?

A. Yes, sir.

Q. Those are in the face amount of $10,000?

A. $10,000, yes, sir.

Q. Interest was to be cancelled, is that correct?

A. Yes, sir.

Q. And you purchased those *debenture* from the Rutherford Corporation?

A. For $10,000.

Mr. Morrison: I think the corporation purchased those didn't it?

Mr. Hecker: The corporation paid it off.

Mr. Morrison: The Kaiser Company purchased it?

A. I don't mean myself personally; the Kaiser Packing Company. I didn't mean personally.

[fol. 131] Q. Individually, though, you did buy the stock for $1,000?

A. Yes, sir.

Q. But the Kaiser——

A. (Interrupting) Packing Company, a corporation, gave a check for $10,000.

Q. Bought the debentures for $10,000 and the interest was cancelled?

Mr. Hecker: Not one debenture, there were two. I think you have always owned one? One went with your stock and one the other?

A. That is right. One of them has Herman's name on it and one Peterson. I believe that is the way it is.

By Mr. Smith:

Q. Upon what date did the Kaiser Corporation buy that debenture for $10,000?

A. July or August, I believe.

Q. Of 1944, is that right?

A. It was in June there.

Q. Was that done at the same time that you——

A. (Interrupting) Yes, sir, that is when it was.

Q. How was that paid, by check?

A. By check, yes, sir.

Q. That check was made out to the Rutherford Corporation?

A. Rutherford Food Corporation.

Q. Did you sign that check?

A. Well, I am certain I signed it. Nobody signs them but me—but myself and Herman Edmondson, but a lot of times I will have the checks signed there for Herman and he writes up his checks, but my signature must be on the check. It wouldn't have been honored if it wasn't.

Q. Now, just so we are clear on this point, Mr. Kaiser, the check was actually paid in June of 1944, is that right, or was it paid at a later time? Did you sign a check or a note in June of 1944?

A. I am sure I signed a check for it.

Q. You don't remember a promissory note signed in June of 1944?

Mr. Morrison: For the debentures?

Mr. Smith: For the debentures.

[fol. 132] A. I know that I signed two notes to the Merchants Bank for $10,000, two different times, borrowing money, but I rush in there, Herman calls me up—in, "Sign a couple of these papers" and I will look at it and sign it right quick, and it could slip my mind the date on it.

Q. You don't remember in settling for that note in August of 1944, paying off a $10,000 note?

Mr. Morrison: To Rutherford?

A. It could be August, because I signed either two or three notes to the bank, renewing $10,000 that the Kaiser Company borrowed from the Merchants Bank, but it might be in August, but I thought it was a little earlier than August.

Q. Besides this $1000, where you had the delayed payment, that is where you picked up your check and paid the $1,000, and besides this deal on the debentures, what other advances of money has the Rutherford Corporation or any official thereof made to the Kaiser Company in the past six or seven months? What loans of money have been paid, if any?

A. Well, they have had stock of meat that was weighed up to them in the cooler. That set there for three or four days, from one weekend to the next. That involved quite a sum of money there, but it was their stock, held in the cooler down here.

Q. What money passed hands then?

A. Well, they just paid for the supplies of meat.

Q. Were there any loans of money between the two companies in the course of the last six or seven months?

A. I wouldn't say six or seven months, but there has been none in the last four months, I know.

Q. There has been none in the last four months?

A. Four or five months, yes, sir.

Q. What loans occurred in the summer or spring of 1944?

A. I don't know. We didn't need any—we didn't borrow any money that I know of at that time. They were still running it.

Q. Speaking of the period, now, after June 1, 1944, let's say, through the summer of 1944.

[fol. 133] A. They were still carrying the plant at that time. You said April or June?

Q. June 1st.

A. June 1st?

Q. Let's state it this way: At what time following the period where you took back the operation of the plant was there a loan of money or advance of money?

A. There was an advance in money there; yes, sir.

Q. In what amount and for what purpose?

A. I am not sure; I think it was about $10,000.

Q. Has that sum been repaid?

A. Yes, sir, that went back—they took that back in meat.

Q. As a matter of fact, Mr. Kaiser, since June of 1944, when you have been operating the Kaiser plant, there have been constantly a number of advances in sums of money beyond what the Rutherford Company has owed you, have there not?

A. Advances to our plant?

Q. To the Kaiser Company.

A. I don't think so.

Q. State whether or not on different occasions $5,000, $7,000 or $8,000 has not passed from the Rutherford Corporation to the Kaiser Company.

A. As much as I know, they are just checks for meat that came in there, for meat that they bought.

Q. Your understanding is that they have paid money only as a customer will pay a bill that is tendered?

A. That is my understanding, yes, sir.

Q. You don't recall their paying these round sums in advance and in addition to any sums owed the Kaiser Company?

A. No, sir.

Q. You don't believe that happened?

A. No, sir, I don't believe it did.

Q. The only advance or loan you recall now is the $10,000 loan?

A. Yes.

Q. Did that occur in about June of 1944?

A. June or a little later, because I had to go to the Merchants Bank and borrow money.

Q. Was interest paid on that loan?

A. Yes, sir.

[fol. 134] Q. And the loan was between the two companies, is that correct?

A. Yes, sir.

Q. Was there a *lot* evidencing the loan, promissory note?

A. Yes, sir.

Mr. Hecker: You mean the bank loan or the Rutherford advance?

Mr. Smith: This is the Rutherford loan.

A. That was a note between us.

Q. That was paid off later on a crediting basis?

A. Yes, sir.

Q. In meat, you said?

A. As much as I know. I told Herman, "We will just credit it on the meat."

Q. Since June, 1944, has the Kaiser Company operated at profit or at a loss?

A. Well, we had a fair period there for a few months, but when the stock begin to come in around the end of July, it has changed there for several months there up and down, there for that period.

Q. Since July have you operated at a loss?

A. Well, we had a good month and we had a couple of bad months in there too; the exact dates, I couldn't give you.

Q. Over all for the entire period since June 1, 1944, what has been the picture?

A. Well, as close as I can remember from the figures that Herman gave me, we had one good month and two not so good and the last month or two now is getting pretty tight. We can't operate much longer if we don't get this subsidy.

Q. You need the government subsidy in order to operate on a profitable basis?

A. We can't run but another thirty days, and we are not going back to Rutherford. We are going to close the plant up.

Q. Mr. VanVoorst still comes out to the plant, does he not?

A. He comes in there occasionally, yes.

Q. He has assisted you on these negotiations for the subsidy, has he not?

[fol. 135] A. Yes, sir. I tell you how that was: I thought I would be smart, running around the alley shovelling manure, and he had had business in Washington, and I asked him to see if he could get those matters straightened out for me. That is the worst thing I could have done. Now I have to hire a lawyer and spend a lot of money. If I had done that in the first place, I probably would have had it.

Q. Mr. Askins has never been on your payroll?

A. No, sir.

Q. He is at the Kaiser plant in the interest of the Rutherford Corporation?

A. That is right.

Q. He is there to see that the meat gets out?

A. He is watching their meat. He don't pay no attention to the kill. He is watching their meat.

Q. His work is in the front end, that is, the cooler, the boning vestibule and the office, up in that end of the plant; is that right?

A. Yes. At times he trims the meat out there in the barrel, because if he didn't do it there, they would have to do it in the Rutherford plant out there. When the army man and the Rutherford man stopped this meat going to the grinder, they will have to take it all out for little spots of rust or dirt or little pieces of hide, so he has been watching Rutherford's interest the whole two years.

Q. Mr. Kaiser, are you expanding the Kaiser plant at this time? Are you doing any construction work out there?

A. Well, we put in two second-hand boilers I bought. Our boiler is practically condemned by the insurance company and we can't shut it down without putting another boiler in first.

Q. Is that boiler used in connection with the tank——

A. (Interrupting) Tank house. That boiler we have in there was second-hand and was built in about 1916, so the insurance company is about ready to condemn it and I bought two second-hand boilers from the Paxton Company for $1,000.

Q. How are you financing that?

A. I will have to go out and borrow some money, but we are expecting to get our subsidy so we can continue operating at present, so all we did was put in a footing and paid [fol. 136] $1,000 for the two boilers over there at Paxton Lumber Company.

Q. You haven't borrowed any money for the project as yet?

A. No, sir. When you have one boiler in a plant and it comes down for boiler inspection once a month and you shut down in the winter, you freeze the plant up. We have an awful time, have had for fifteen years, and now we had a chance to get two second-hand ones, so I bought them.

Mr. Smith: I believe that is all.

Cross examination.

By Mr. Morrison:

Q. I want to ask a few questions. Mr. Kaiser, this Kaiser Packing Company for a good many years has been in a lot of financial difficulties, hasn't it?

A. That is right.

Q. And you had a mortgage on the plant to the Kaw Valley Bank?

A. That is right.

Q. And it is still on the plant?

A. $10,000.

Q. $10,000, and then you have had to get money from the R.F.C.?

A. Yes, sir, $20,000.

Q. In order to do that, what did the Kaw Valley Bank have to do with their mortgage?

A. They had to take the second.

Q. They had to, in other words, subordinate it, to take a second mortgage.

A. That is right.

Q. I am not trying to go into accurate details.

A. That is all right.

Q. You finally got Mr. Benjamin to go in with you and put some money in?

A. That is right.

Q. And how much did he put in?

A. Well, Mr. Benjamin put in about, oh, I would say $8,000 or $10,000 but I had the R.F.C. cut down to $12,000, and he took me back up. We had to borrow $8,000 more [fol. 137] from Mr. Johnson at the R.F.C. to raise some money for stock.

Q. What did Mr. Benjamin get for his $8,000 or $10,000, whatever it was?

A. After five years, he got $20,000.

Q. No, no, I mean at that time what did they give him. Did he get debentures and stocks?

A. He got fifty-one per cent of the stock and the debentures. He made a corporation out of it. He wouldn't take it unless he made a corporation out of it.

Q. He had certain priorities on his debenture? He got a $10,000 debenture?

A. Yes.

Q. And you got a $10,000 debenture?

A. That is right.

Q. But he had certain priorities of his debenture over yours?

A. That is right.

Q. But he got the whole thing for about $10,000?

A. That is right.

Q. Then you were struggling along at the time that you made this, or Benjamin made the sale to Rutherford?

A. Yes.

Q. Is that right?

A. That is right.

Q. The company was still in financial straights, wasn't it?

A. Yes, sir.

Q. Or difficulties?

A. Well, Mr. Morrison, we were shipping a lot of beef.

We were shipping around 400 cattle a week, and on sight draft bill of lading. That meant we could kill cattle today and ship tomorrow, and draw on the bank for that car of cattle every time we ship. That was the same as a cash transaction. That would keep us going along, going pretty nice, providing we kept rolling every week and never slowed up on it. Mr. Benjamin would stop me when it would be a good week to buy cattle at the yard, he would stop me from buying it and we would have a bad week or two at the plant that hurt me down there all the [fol. 138] time he was there, the whole five years. We were killing for Rath Packing Company, buying them here for Rath and shipping it to him, and I could have made $15,000 the fall of 1942 if Benjamin would have let me alone, but he stopped me on the custom kill. We had the sale set to buy the cattle for Rath and everything was O. K. and he stopped me shipping to Rath, and we lost three months right at the good time of the year. Every time I would want to go, he would stop it, naturally, he had the say-so, and he just drug it along, but couldn't go on that way, so he decided to sell to Mr. Koch out here at American Meat. They were awful good friends. I couldn't see that.

Q. That would have placed control of the company in the American Meat?

A. That is right.

Q. And you would have had nothing to say, except you had been a minority stockholder?

A. That is right. Koch Francis is his name.

Q. At that time in March, 1943, there were a lot of government contracts?

A. That is right.

Q. Was that why American Meat wanted it or what did they want it for?

A. They wanted it so they could have a plant to kill, so they took the Eldridge plant.

Q. They wanted to get a plant to kill for what?

A. Government and their market. They coudn't buy any meat. By the time these big concerns couldn't get any meat any more——

Q. (Interrupting) They wanted to get meat; that is what they wanted to get?

A. That is right.

Q. You didn't want them in there?

A. That is right.

Q. But Benjamin could get a price of approximately $20,000, or he told you so?

A. That is right.

Q. So you were looking around to see if you could get somebody else to take it instead of him, isn't that right?

A. That is right.

[fol. 139] Q. That is when you first got this contact with Rutherford, isn't that right?

A. Yes.

Q. Rutherford bought from Benjamin?

A. That is right.

Q. That was a combination deal; that is, they bought the stock and the debentures?

A. Tnat is right.

Q. I will ask you to state whether or not, in your opinion, the price that he was able to get either from American Meat or from Rutherford was due more to the special conditions that existed than to any actual value in the company?

A. Well, Mr. Morrison, at the time that Mr. VanVoorst and I were talking about the Rutherford Corporation coming in, and the American Meat, it was all supposed to be transacted within two or three days, and while I was talking to the Rutherford people, even Kansas City Dressed Beef wanted to give $21,000; they wanted to give $1,000 more, Kansas City Dressed Beef wanted it.

Q. I say, was that in order to get the meat, rather than any value in the plant?

A. Mr. Morrison, the plant ain't worth fifteen cents if they haven't got a volume of business.

Q. That is what I wanted to bring out, just because of getting a volume of business that any of those people wanted it?

A. Yes.

Q. The value wasn't there?

A. Just a place to get this meat killed and slaughtered and put on the market. If it was shut down tomorrow, nobody would give over $500.00 for the whole darn plant.

Q. I don't want to go into details, but because of various considerations relating to ceilings, etc. there have been

troubles, difficulties, both prior to the time Rutherford bought and since, isn't that right?

A. That is right.

Q. So that for a while it appeared necessary for Rutherford in order to carry on the business at all, for Rutherford to lease, or somebody to lease——

A. (Interrupting) That is right.

Q. (Continuing) —that plant, isn't that right?

[fol. 140] A. That is right.

Q. That was just a matter of necessity?

A. That is right.

Q. Isn't that correct?

A. That is right.

Q. Otherwise, as far as you were concerned, you were just confronted with bankruptcy?

A. That is right.

Q. They couldn't go along and you couldn't go alone? And that lease was made and was that carried out in good faith?

A. Yes, sir.

Q. Rutherford leased the plant and they ran that business, is that right?

A. That is right.

Q. Then there came a time when it appeared that that lease, from a financial standpoint, would have to be abandoned, isn't that right?

A. That is right.

Q. And then the conditions had to be met with respect to the subsidy, or some other arrangement; they would have to sell your plant or do something with it, isn't that correct?

A. That is right.

Q. That appeared to be an absolute necessity? Now, when that time arose, that was along sometime in May or June or July—when was it, in this year when you discussed the question of what would be done; was it about June?

A. June, yes, sir.

Q. Now, at that time did or did not the Rutherford people discuss with you the matter of your buying out their interest in the plant?

A. Yes, sir.

Q. They had the $10,000 debenture with interest?

A. That is right.

Q. A lot of overdue interest, and you had one yourself with overdue interest, isn't that right?

A. That is right.

Q. Then they had this stock which they had bought at this fictitious value from Benjamin, because they needed the opportunity to get meat?

A. Yes.

[fol. 141] Q. Now, at that time did you want to buy personally; did you want to buy aside from the necessities of the business; did you want to put money in the stock or debentures, or were you——

A. (Interrupting) Well, I was trying to keep up with what the Dressed Beef and those had done; I thought maybe I could get the subsidy and go on through with it, and they tied it up on account of they figured the relationship was still too close.

Q. You were willing then to take over the business if you could arrange it?

A. Yes, sir.

Q. But as far as the stock was concerned, did you consider that the stock had any value?

A. No, I didn't, Mr. Morrison.

Q. And the deal you made was a combination deal, wasn't it?

A. That is right.

Q. To take the debenture and the stock?

A. Yes.

Q. Isn't it a fact that you objected, after you had agreed to take the debenture at $10,000, that you objected to paying anything but $1.00 or some nominal consideration for the stock, isn't that right?

A. That is right.

Q. You argued considerably about it?

A. That is right.

Q. And they insisted that you pay $1,000, isn't that right?

A. That is right.

Q. Did you or did you not at that time tell them that the Company could pay the $10,000, but that this $1,000 would have to be financed for you for a while, isn't that right?

A. That is right.

Q. Did you have some expectation of getting some money out of some pigs and what not at that time?

A. Yes, sir, we had a bunch of hogs out to my mother-in-law's at City Park. We got those here last February. I was hauling slop in the evening out to those hogs.

Q. Without going into detail, did you at that time, when you bought the stock, give Mr. VanVoorst on behalf of the Rutherford Company a check for the $1,000?

[fol. 142] A. Yes, sir.

Q. And did you make some sort of an arrangement, agreeable to you, that he would hold the check for the time being?

A. That is right.

Q. But was there an agreement under w[redacted] Mr. VanVoorst was to advance or procure the advancement of the $1,000 on its payment in cash to the Rutherford Company for you?

A. Yes, sir.

Q. And has it been your understanding that that was carried out?

A. Yes, sir.

Q. You don't know when?

A. No.

Q. I mean personally?

A. Personally.

Q. But you have been assured that it was?

A. Yes.

Q. Now later on, you got Mr. VanVoorst or requested the return of the check, didn't you?

A. Yes, sir.

Q. You never did pay the $1,000 in cash until just the last day or so, did you?

A. Just lately.

Q. But you don't know when he paid the company the cash?

A. No, I don't.

Q. Personally?

A. No, sir, I don't.

Q. I wasn't quite sure whether you understood and I am not sure that I understood the question, but you have repaid Mr. VanVoorst the $1,000?

A. Yes.

Q. But that was only in the last day or two?

A. That is right.

Q. Did you pay him any interest on the money?

A. Yes, sir.

Q. At what rate or how much interest did you pay him?

A. $10.00 interest on the $1,000; $10.00 interest.

Q. Has there ever been any agreement either expressed or implied that Rutherford or VanVoorst or Mr. Henry [fol. 143] Rutherford—I mean the Rutherford Company or anybody—has any right to buy that stock back from you?

A. No, sir.

Q. Or to ever make any arrangement, lease or anything else with the Kaiser Packing Company?

A. No, sir.

Q. I will ask you whether or not you told them specifically and emphatically that if you made this deal and they got their $10,000 out, that it was to be understood that there were no strings to the deal?

A. That was the understanding that I had.

Q. Absolutely——

A. (Interrupting) Completely cut off, because there is no use of any more changes this way. I will either make it now or else, for myself.

Q. And having made it, you have no intention of ever selling it if you can possibly hold onto it, is that right?

A. That is right.

Q. You are still on friendly terms with Rutherford?

A. Yes, sir.

Q. And you do business with them without friction?

A. Yes, sir.

Q. Substantially so?

A. Yes, sir.

Q. Is there or is there not an important consideration always in the business world——

A. (Interrupting) Yes, that is right.

Q. (Continuing) and in your type of business is it practically essential in supplying a contractor that your output go to one contractor?

A. Yes, sir.

Q. In this government work, does the man who has the government contract, like a chili contract that they have, have to have a dependable source of supply?

A. Yes, sir.

Q. As near as possible?

A. Yes, sir. They were making 60,000 pounds of chili there every day and they had to have a constant supply, where Kansas City Dressed Beef used to cut him off maybe every other day, or just give him so much, and give him what they wanted to and all that, see.

[fol. 144] Q. They did, as a matter of fact, have lots of trouble with Kansas City Dressed Beef?

A. They had a lot of trouble with them, yes, sir.

Q. At the time he was making the arrangements with Benjamin, Kansas City Dressed Beef was, at times, just not giving them enough to carry on, isn't that right?

A. Yes.

Q. Now, have you any written contract with them as to the amount that you will supply to them?

A. No, sir.

Q. That is just a verbal understanding?

A. Verbal understanding to give them all that I can produce.

Q. They had that understanding with the Kansas City Dressed Beef, didn't they?

A. As much as I know; yes, sir.

Q. But they didn't carry it out?

A. They didn't carry it out.

Q. You could, as a matter of fact, if you wanted to, cut off Rutherford tomorrow?

A. That is right.

Q. Could you?

A. That is right.

Q. And make a deal with somebody else?

A. Yes, sir. I had Stokley Brothers in here last week wanting to come in with me, but I couldn't see it.

Q. You have no understanding with Rutherford but what you can do otherwise if you want to?

A. It is all verbal.

Q. You do have a verbal agreement to give him his stuff?

A. That is right, a verbal agreement.

Q. Now, there isn't any question but what one of the important considerations, if not the most important consideration in your buying this stock and having the company buy these debentures was the fact that you wanted

to put the company in a position to obtain a subsidy, is that right?

A. That is right.

Q. And I think you said a moment ago, if you cannot get the subsidy, as you see it, you are going to have to close up very shortly?

A. That is right.

[fol. 145] Q. And there is no agreement, expressed or implied, under which Rutherford now has any interest in any plan whatever?

A. That is right.

Q. You are your own boss 100%?

A. That is right.

Q. And it is your present intention to remain so if you don't have to go into bankruptcy, is that right?

A. That is right.

Q. On the other hand, if you are caught here between the horns of this dilemma of your price ceilings and no subsidy, you may have to go into bankruptcy?

A. That is right.

Q. You spoke about having to hire a lawyer to handle this subsidy matter for you. When this particular suit was begun—this was begun, I believe in May?

Mr. Smith: Yes.

Mr. Hecker: May 27th.

Q. May 27th, 1944, at that time Rutherford Packing Company owned fifty-one percent and you individually owned forty-nine percent?

A. That is right.

Q. And this firm was employed to represent both defendants, isn't that right?

A. That is right.

Q. And we have continued in that representation, is that right?

A. That is right.

Q. But we don't represent you since you bought the plant; we didn't represent you in anything else?

A. No, sir.

Q. You hired another lawyer to handle this subsidy matter for you, is that right?

A. Yes, sir. I have had a friend of mine, that I have went to for several years, and I have asked him to see about getting something done on this subsidy now.

Q. We have never done anything about it?

A. No, sir, I didn't talk to you, Mr. Morrison, because I figured when we cut connections, even though we were [fol. 146] friends and met here and all, but I just thought I ought to get somebody outside.

Q. You don't need to apologize for it. You never even told me; you just went and got your own lawyer, is that right?

A. That is right.

Mr. Morrison: That is all.

Redirect-examination.

By Mr. Smith:

Q. I have just one question. Mr. Kaiser, at the time the lease was cancelled, and your complaint says the date is June 1, 1944——

Mr. Hecker: May 1, 1944.

Mr. Smith: That is right. May 1, 1944.

Q. You didn't have any idea then that you were going to buy back stock from the Rutherford Corporation, did you?

A. Well, when I knew what Kansas City Dressed Beef did with the thing, it was in the back of my mind.

Q. Just answer the question. Did you have any idea you were going to buy stock in the Kaiser Corporation from the Rutherford Corporation?

A. Yes, I had it in my mind.

Q. It wasn't a part of the plan of May 1, 1944, was it?

A. Well, I still had it in the back of my mind.

Q. You thought you would be able to obtain the subsidy just by cancelling the lease, did you not?

A. Well——

Q. Without any resale of stock?

A. No, that wouldn't have it, because I had talked—that wouldn't do. It would have to be an out and outright cutoff.

Q. You learned that at a later date, did you not, Mr. Kaiser? You thought on May 1, 1944 that the cancellation of the lease would give you what you wanted, the government subsidy without any further or additional steps, did you not?

A. I didn't think it could be done, no, sir.

Q. In any event, all you did at that time was cancel the lease?

[fol. 147] A. Cancelled out, never giving that part of it a thought; that is right.

Q. State whether or not later on the suggestion was made that Mr. VanVoorst buy the stock of the company. Do you remember that suggestion?

A. No, sir, I don't.

Q. State whether or not it was learned later on that an official of the Rutherford Company could not own it, because that represented indirect control.

Mr. Morrison: If you will pardon me, Mr. Smith, may I suggest that Mr. Kaiser would not be involved in the purchase of the stock by VanVoorst from the Rutherford Company; he wouldn't be a party to that.

Mr. Smith: I think that is correct. I just asked whether or not he has any knowledge of that. I have been through that once.

Mr. Morrison: He said not.

By Mr. Smith:

Q. You have no knowledge at all of that?

A. No, sir, I don't remember ever hearing that. I don't.

Q. State whether or not it isn't a fact that in about the middle of June of 1944, the plan was evolved about the sale of the stock to you from the Rutherford Corporation; didn't that happen? Wasn't that discussed about June 15, 1944?

A. I just remember slightly something, but I couldn't tell you the full particulars of it.

Q. Mr. Kaiser, following May 1, 1944 and before June, 1944, you made an application for the subsidy, did you not?

A. Yes, sir.

Q. That was denied in that period, was it not?

A. Yes, sir.

Q. And then following the denial, you worked out this plan for the sale of the stock, did you not?

A. Yes, sir.

Q. Now, you never would have repurchased that stock

at all if the subsidy had been granted in May or June of 1944, would you?

Mr. Morrison: Well, I object to that. I do not see the materiality of it. By the way, aren't we trying an hour and labor case? Why would that be material?

[fol. 148] Mr. Smith: Well I think the connection between the two companies is material.

Mr. Morrison: But don't you think we have pursued it far enough?

Mr. Smith: This is my last question; then I am through.

Mr. Morrison: I think he has testified that this was practically forced upon them by the necessity of the subsidy. I do not see how, Mr. Smith, a man can compete with anybody; because other people are getting the subsidy, unless he can get it.

Mr. Smith: That is true.

Mr. Morrison: My God, he has to sell his house and everything he has pretty soon, if he is going to stay in business. You can't do it without a subsidy, can you? Is there anything wrong with it?

Mr. Smith: The point that was not clear in the record until now was that the cancellation of the lease and the resale of the stock were two separate operations.

Mr. Hecker: There is no question about that.

Mr. Smith: And in between the two came an application and denial. That is all I want to bring out.

Mr. Hecker: There is no question about that.

Mr. Morrison: We can admit to you that we were counsel for the company at the time and we were groping. We were trying to find how the company could meet—they were caught between the upper and nether millstone. I assure you that we were trying to help them find a way out of it and do it legally, fairly and open and above-board.

Mr. Smith: Yes.

Mr. Morrison: Now, we have done the best we could, and now we are divorced from Mr. Kaiser and his company and they are on their own. Where they are going to wind up, I don't know. Maybe we didn't handle it right, I don't know, we did the best we could.

Mr. Smith: There is certainly nothing wrong with [fol. 149] seeking the subsidy. I am trying to get at

the true nature of the various associations between the two companies.

Mr. Morrison: That was it, and I can assure you from my own participation in it that it was a clean cut deal. The severance was as clean and complete as far as I know that could possibly be made, and somewhat painful, I guess, for both sides, and throws a heavy responsibility on Mr. Kaiser. What the legal effect of it is I am not trying to say. I know as far as we are concerned, we did the best we could.

Mr. Smith: That is all I have.

Mr. Morrison: That is all.

(Witness excused.)

Paul Oscar Kaiser.

Subscribed and sworn to before me this 3rd day of February, 1945. My Commission Expires February 12, 1947. Vivian A. Krimminger, Notary Public.

NOTARIAL CERTIFICATE

STATE OF MISSOURI,
County of Jackson, ss:

I, Vivian A. Krimminger, a Notary Public in and for Jackson County, Missouri, duly commissioned and qualified and authorized to administer oaths and to take and certify depositions, do hereby certify that pursuant to the foregoing stipulation, to take depositions in the civil cause depending in the District Court of the United States, for the District of Kansas, Division 1, wherein L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, is Plaintiff, and Rutherford Food Corporation and The George Kaiser Packing Company are defendants, I was attended at the law offices of Messrs. Morrison, Nugent, Berger & Johns, 1701 Bryant Building, in the City of Kansas City, in the county of Jackson and State of Missouri by Messrs. H. J. Smith, Attorney, and John W. Johnson, Supervising Inspector, for the said plaintiff, and by Messrs. E. R. Morrison and Robert L. Hecker, counsel for the said defendants, on the day and date hereinbefore stated; that the aforenamed witness, Paul [fol. 150] Oscar Kaiser, who was of lawful age, was

by me first carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth; and he thereupon testified as is above shown, and that the deposition as above set forth was reduced to shorthand by me in the presence of the witness himself, and from his statements, and subscribed by him as hereinbefore set out, and said deposition was taken at the place and time as hereinbefore set out, and that all was so done in the presence of said counsel for said plaintiff and defendants.

I further certify that I am not attorney or counsel for and have no office connection or business employment of any kind with any of the parties to this action or with their attorneys; that I am not connected by blood or marriage with either of said parties; that I am not interested, either directly or indirectly, in the result of said action.

Witness my hand and seal as such notary at Kansas City, Jackson County, Missouri, on this 13th day of Feb., 1945.

Vivian A. Krimminger, Notary Public in and for Jackson County, Missouri. My Commission expires February 12, 1947. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed May 3, 1945

This is an action to enjoin the defendants from violating certain provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U.S.C.A. sec. 201 et seq.), hereinafter referred to as the Act, and the regulations issued pursuant thereto.

The complaint specifically charges the defendants with having violated the Act by employing many of their employees in the production of goods for interstate commerce for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating said employees for said employment in excess of the designated hours [fol. 151] at rates not less than one and one-half times

the regular rate at which they were employed, and that said defendants have failed to make, keep and preserve adequate and accurate records of their employees and the wages, hours and other conditions and practices of employment maintained by them, as prescribed by said regulations, and prays for judgment enjoining and restraining the violations alleged.

The defendants have filed their answers denying generally the allegations of the complaint and allege further that at all times since the Act became effective they have made and are making every effort to comply with the Act and the regulations issued pursuant thereto.

The case was submitted on a stipulation of facts, the depositions of three witnesses and written briefs.

George Kaiser, father of Paul O. Kaiser, president of the defendant corporation, The George Kaiser Packing Company, hereinafter referred to as the Kaiser Company, began operations in 1890. The Kaiser Company was incorporated in 1935. The packing plant began as a very small organization engaged in slaughtering animals for local markets and later its business increased and it began shipping carload lots of carcasses to Chicago and other points. Prior to 1942 it had approximately thirty employees.

In 1942 the United States Government began the purchase of large quantities of beef, boned to Army specifications. The Kaiser Company had never done any boning of this character though previously one man in the cooler had spent part of his time boning loins and other cuts of better grade cattle for the meat shop trade. The Kaiser Company made inquiries as to how to get started in this business and the fact that said company was interested in securing boners came to the attention of a man named Reed, an experienced boner, who had previously worked in St. Louis packing plants where beef was boned under independent contractors who employed boners and where the work was done on a hundredweight basis. Reed proposed to make a contract with the Kaiser Company on the same basis, and after accepting Reed's proposition, said company entered into a written contract with Reed. Reed had associated [fol. 152] with him in this character of business a man

named Peterson and while the contract was made directly with Reed, Peterson also signed it.

The contract in substance provided that Reed would do the boning at the Kaiser plant, furnish all labor and equipment, such as instruments necessary in said work, for the sum of 40 cents per hundred pounds of boned meat; that the Kaiser Company would provide the space in which the boners were to work, would furnish the tables on which they were to work, and would provide barrels, properly cleansed, from time to time, in which the various types of boned meat, bones and other products from the carcasses were to be placed. The Kaiser Company also agreed to furnish Reed all carcasses of beef for boning ordered from it by the United States Government or by canning organizations working on government contracts. Reed was required to complete the boning of all carcasses furnished him each day and in addition to the boning, was to strip and remove certain inedible portions such as leaders, glands and clots, and was required to cut the carcasses into boneless chucks, ribs, plates, loins and rounds.

The contract further provided that Reed was to perform the work "as an independent contractor in the vestibule of the Kaiser Packing Plant." The Kaiser Company agreed to deliver the carcasses to Reed on the overhead rail, in the vestibule, and pick up the boned meat and waste after it had been sorted by Reed in the barrels which the Kaiser Company was to furnish. Reed was required to perform the work in compliance with government specifications and regulations, and under and in accordance with the approval and direction of all government inspectors. Reed agreed to employ, compensate and be responsible for all of his employees, who would be under and subject to his sole direction and control and the Kaiser Company had no right to supervise or direct the work of Reed or any of his employees. Reed also agreed to carry workmen's compensation and employer's liability insurance and to protect, indemnify and defend the Kaiser Company from and against any injuries to persons or property caused by him or any of his employees. [fol. 153] Reed agreed that neither he nor his employees would interfere with ingress or egress of the Kaiser

Company's employees or the carrying of products through the vestibule.

The beef when boned was to be packed in separate boxes, each containing one hundred pounds of boned beef, and the Kaiser Company agreed to keep a record of the weights, subject to the inspection of Reed, and to furnish Reed with a daily copy thereof, settlements for the contract price to be made on a weekly basis running from Thursday of each week through Wednesday of the following week, payment to be made to Reed by the Kaiser Company within two days after such settlement.

Reed also agreed that all of his employees should be affiliated with the CIO and neither party should be liable for failures occasioned by breakdowns, strikes, acts of God, or other unavoidable contingencies.

Reed was to commence his work October 15, 1942 and continue for the duration of hostilities subject to termination by either party on two weeks' notice.

Reed and Peterson immediately assembled a crew of boners and carried on the contract until February, 1943, at which time Reed left the work and Adolph Schindel, an experienced boner then working at the plant, took over the boning under an oral agreement to continue on the terms of the Reed contract. He assembled a similar crew of boners and carried on the contract for a year and three months. In May, 1944, Schindel gave up the work and it was taken over by Hooper and Deere, who were then working under Schindel, as boners. Hooper executed a written contract with the Kaiser Company on October 28, 1944, which is still in force. The provisions of that contract are substantially the same as those of the agreement between Reed and the Kaiser Company executed in October, 1942, except that it provides for $100 monthly rental for the vestibule and the maximum quantity of beef that might be required to be boned was raised to 40,000 pounds per day and the consideration raised to 45 cents per hundredweight, which raise had been in effect since January, 1944, under the [fol. 154] Schindel contract. No rental has been paid for the reason that Hooper contends that other conditions have not been complied with.

It is unnecessary to go through the details of the boning process which have received much attention in the briefs of counsel and in the stipulation, but the contract is definite

and clear and is set out in full as part of the stipulation of facts.

It is the contention of the plaintiff that this contract is merely a sham or deception and that all of the boners were and are in fact employees of the Kaiser Company. The stipulation, however, contains the following:

"37. The plant operator (the Kaiser Company) has never exercised any direction or control over any sharing or division of the boning money and has no direct knowledge of how the division is and has been made or determined, or of what boners have been hourly paid or their rate of pay.

"38. At no time has the plant operator kept any records with reference to the boners, except that the plant operator has kept complete and accurate records of the weight of beef boned, and a complete and accurate record of the weekly sums paid for said boning as aforesaid on the aggregate weight of the boned beef on a hundredweight basis.

"39. At no time has the plant operator, through Paul O. Kaiser or any other company official, exercised direction or control over who shall work as boners or engaged the services of any boner or made any arrangements, contract, or agreement with respect to compensation with any boner, except in the instances of the arrangements with Reed, Peterson, Schindel, Deere and Hooper, as aforesaid, and except in the instance of one Dolinar, whose employment by Reed as a boner was directed by The Kaiser Company. The plant operator has not directed the boners to start on their work at any set time, to leave at any set time or fixed their luncheon or other rest periods. They have determined their own hours of work, though in general their hours of work on a given day would correspond to the hours other work in the plant was in progress. They have boned on days when *their* was no 'kill' and cattle have [fol. 155] been killed days on which they did not bone. Such plant operator employees as the bar l washer, laborers handling the barrels, etc., of course work about the same hours as the boners.

"40. The Kaiser plant has had continuous successive union contracts with the Packing House Workers

Organizing Committee, Local No. 36 (C.I.O.), since 1941, providing for a closed shop and check-off system and recognizing such union as the sole collective bargaining agency for all maintenance, piece workers and production workers in its Kansas City plant. Jobs are classified and wage scales and working conditions in the plant are determined by these contracts. The boners are not classified or mentioned in any of these contracts, and the Union has not at any time asked that they be brought under the plant contracts. However, the Union has required that all boners be members of the Union. The boners have all been members of the same Union, but the plant operator has not collected their dues and the check-off system has not been applicable to them and they are not represented by or subject to any control by the steward of the Union at the plant. The plant operator has at no time included the boners in its Workmen's Compensation liability policy, and such boners as have been cut or otherwise injured while boning have paid their own medical attention. The plant operator has not at any time made any deduction from the checks payable to Reed, Schindel, or Hooper for unemployment compensation taxes or withholding taxes. No application has ever been made by either the plant operator or any boner to the Regional War Labor Board for approval of sums or rates paid to boners collectively or individually by the plant operator or by any boner."

It is apparent from this record that boning is rather a special art and only within the past few years has this work been done by packing plants or slaughterhouses generally. It is a *speciality* not open to the ordinary laborer without training and experience. It is not unreasonable that the Kaiser Company, when it undertook to fill these government contracts, was anxious to acquire this highly skilled labor so as to meet the government requirements. It therefore entered into this contract with Reed and his [fol. 156] successors to do this work on a poundage basis. It did not employ any of these men except by the contract above stated. All boners who worked with Reed and his successors were employed by Reed or his suc-

cessors, their hours were fixed by them, wages or division of compensation for the boning was arranged between Reed and his employees as they saw fit, and at no time was the Kaiser Company ever consulted or advised with, with reference to what should be paid to any boner or what hours any boner should work. The record discloses that some days they worked three or four hours, others they worked fully eight hours, but in rare instances did they ever exceed eight hours.

The first question to be determined, therefore, is whether or not this is such an independent contract as would eliminate the Kaiser Company as an employer with reference to these boners, under the Act. Voluminous briefs have been filed, citing numerous authorities, many of which are not in point, but a few of the cited cases will be given consideration.

In Bowman v. Pace Company, 119 F. 2d 858, 860, 5th Cir., 1941, cited by counsel for both the plaintiff and the defendants, the court said:

> "The strongly contested issue is whether he was the employee of the Pace Company at all. If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. * * *"
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> * * * * * * *
>
> "* * * If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort."

In Walling, Adm'r, v. American Needlecrafts, Inc., 139 [fol. 157] F. 2d 60, 6th Cir., 1943, relied upon by the plaintiff, the court cites with approval and quotes from the opinion in the Bowman Case, supra.

It seems that the dividing line in all of these cases is: Who does the hiring and who does the paying?

The real purpose of the Act was the maintenance of the minimum standards of living necessary for health, efficiency and general well-being of workers, and to carry out that purpose, it provided for reasonably short hours and a reasonable minimum pay. The function of the administrator is to carry these purposes into effect and not to make the Act an excuse or means for interfering with legitimate business conducted in the best *inerests* of employer and employee.

Under this record, none of those alleged to be boner employees or admittedly employees of the Kaiser Company were dissatisfied with their employment or made any complaints, and certainly, so far as the boners are concerned, the wages paid are far in excess of the minimum prescribed by the Act and the hours were not inconsistent with those provided in the Act. In fact, the hours were so reasonable as to raise no possible inference of any intent to impose hardships or substandard conditions upon the workers.

The right to contract is not only an inherent right but a constitutional right, and independent contracts, as a method of quantity production of boned beef, have not been uncommon in the packing business, generally. Reed, before coming to the Kaiser Company, had boned under independent contracts in two different packing plants and when he left the Kaiser plant, he made a like contract with another packing company which has been carried on by him and his successors ever since. The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest [fol 158] in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be equitably taken care of by payment on an hourly basis out of the boning money. There is nothing in the con-

tract to prevent the contractor or the group from paying overtime to the boners who work on an hourly basis, which plan was practiced by Hooper since he took over in May, 1944, and which was in effect at the date on which this suit was filed.

It certainly is immaterial that the work was done by the boners on the premises of the Kaiser plant as it was much more convenient to do and to have the work done on the premises than otherwise.

The only incident as disclosed by the record in which the Kaiser Company attempted to exercise any control or management over the boning business was to complain to its independent contractor if the work done did not meet the requirements of the contract. For instance, if too much meat were left on the bones, the Kaiser Company made objections to the boners, as it had a right to do.

There is nothing in the record to indicate that the plan adopted by the Kaiser Company and its boning contractor is contrary to the principles of the Act and it would be difficult to conceive of a method of doing business that would do more to promote the principles of the Act. There is a distinct difference in having this work done by an independent contractor and in having it done by piecework where the employment is made by the employer with the individual worker, as shown in many of the cases cited by the plaintiff.

In Ryan-Richards, Inc., v. Whitesides et al., 96 F.2d 826, 835, 10th Cir., 1938, the court said:

> "The mere fact that a proprietor retains a general supervision over work to be constructed for him by another, to satisfy himself that the contractor carries out the stipulations of his contract, does not make the proprietor responsible for the wrongs done to third persons in the prosecution of the work. * * *"

[fol. 159] And in another case from the Tenth Circuit, Jones v. Goodson, 121 F.2d 176, 179, (1941), the court said:

> "* * * The relationship of master and servant exists where the employer has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while an independent contractor is one who engages

to perform service for another according to his own method and manner, free from direction and control of the employer in all matters relating to the performance of the work, *except as to the result or the product.* The line of separation between the two is the degree of direction and control. In the former direction and control cover both method and manner of doing the work and the result produced; in the latter direction and control are limited to the result and do not apply to the method and manner of the service rendered. Singer Manufacturing Co. v. Rahn, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440; Casement v. Brown, 148 U.S. 615, 13 S. Ct. 672, 37 L. Ed. 582; * * *." (Emphasis supplied.)

It is not difficult, therefore, for this court to reach the conclusion that the boning was done by independent contractors, and that the relation of employer and employee did not exist between the Kaiser Company and the boners.

The Rutherford Food Corporation, hereinafter referred to as Rutherford, is a Missouri corporation having its principal office, place of business and manufacturing plant in Kansas City, Missouri. Prior to July 1, 1943, it was engaged in processing meats, principally manufacturing chili for the United States Government, and was having difficulty in securing sufficient quantities of boned meat to supply its needs. It had been purchasing most of such meat from one source, but had been notified by that source that it would not furnish more meat at the ceiling price.

Prior to March, 1943, 51 per cent. of the capital stock of the Kaiser Company was owned by one Lionel Benjamin and Paul O. Kaiser owned the other 49 per cent. In March, 1943, Rutherford acquired Benjamin's stock. By acquiring a controlling stock interest in the Kaiser Company, Rutherford thought it could assure itself of a [fol. 160] steady supply of meat. Before buying said stock, it had given consideration to the purchase of the Kaiser plant or some other packing plant.

The Kaiser Company could not sell boned beef at the ceiling price and buy cattle and pay its operating costs, so it was operating at a loss prior to March, 1943, and continued to do so after Rutherford bought its stock.

Rutherford had to advance money to the Kaiser Company and by July 1, 1943, the Kaiser Company was indebted to Rutherford in excess of $50,000 on open account in addition to $10,000 debenture. To avoid further operation of the Kaiser Company at a loss and to assure itself of a future supply of meat, on July 1, 1943, Rutherford leased from the Kaiser Company its packing plant, equipment and facilities in Kansas City, Kansas, and thereafter operated said plant under government inspection until May 1, 1944, when said lease was cancelled and its federal license surrendered.

The Kaiser Company had no federal license to slaughter from July 1, 1943, to May 1, 1944, and during such period Rutherford was licensed as a slaughterer by the Livestock and Meats Branch of the War Food Administration. On May 1, 1944, this license was cancelled and a license reissued to the Kaiser Company.

During the time the lease was in effect, Rutherford took over the entire Kaiser Company payroll, including Paul O. Kaiser as manager, with the exception of certain employees, and its method of handling the payroll and its operation of the plant was in substantially the same manner as that of the Kaiser Company immediately prior to July 1, 1943.

During the preiod Rutherford operated the Kaiser plant, it sold the Kaiser Company, at slightly under ceiling prices, such parts of the slaughtered cattle as it could not use for chili or other canned meat, such as hides, cheek meat, variety meats, tenderloins, offal, etc., as well as a few carcasses for sale by the Kaiser Company to its city trade.

In November, 1943, the United States Government made provision through the agency of Defense Supplies Corporation to pay to nonprocessing slaughterers of beef an ad- [fol. 161] ditional subsidy of 80 cents per hundred pounds liveweight of all cattle slaughtered. This was in addition to a subsidy then being paid all slaughterers of 50 cents per hundred pounds. This was necessary because the low ceiling price of beef was inadequate to permit a slaughterer to purchase cattle, on which there was no *celing* price, and to pay operating costs. The additional subsidy on the kill at the Kaiser plant would amount to $10,000 to $12,000 a month. Without this subsidy the

operation of the plant by Rutherford had been unprofitable. Officials of Rutherford determined that the corporation would not renew the lease when it expired July 1, 1944, expecting that if the Kaiser Company could get the subsidy it could resume operation of the plant at a profit.

The lease was cancelled May 1, 1944, to enable the Kaiser Company to apply for this subsidy. Upon investigation, it was determined that under the regulations of the Defense Supplies Corporation, the Kaiser Company could not qualify for the subsidy so long as any processor, such as Rutherford, directly or indirectly owned more than 10 per cent. of the stock. On June 19, 1944, Rutherford sold its stock in the Kaiser Company to Paul O. Kaiser, and agreed to accept meat to be supplied regularly in payment of said stock and certain indebtedness of the Kaiser Company to Rutherford. While the Kaiser Company had approximately $42,000 in the bank on May 1, 1944, such capital was soon depleted as it was supplying meat to Rutherford to apply on its debt and had little cash coming in from other sources. The Kaiser Company for some months was financially embarrassed and Rutherford lent it $10,000, taking its note therefor. On August 31, 1944, this note was cancelled and the balance of the debt transferred to an open account with the understanding it could be paid in meat. During all of this period, the Kaiser Company had a large inventory of variety meats, which it required time to liquidate. The Kaiser Company's indebtedness to Rutherford continued to be reduced from time to time until October 20, 1944, at which time settlement was made with Rutherford in full, and the Kaiser Company has not been indebted to Rutherford since said date.

[fol. 162] From March, 1943, to July 1, 1943, and since May 1, 1944, to the present time, Rutherford has purchased approximately 90 per cent. in value of the output of the Kaiser plant.

It is the contention of the plaintiff that Rutherford and the Kaiser Company are so closely connected that their business at least is inseparable. The stipulation of facts does not support such contention. It was not unusual for large business corporations to become financially involved during the period involved here. Many packing plants throughout the country which were forced to buy

cattle without a ceiling and sell meat at ceiling prices, became financially embarrassed and many of them closed their doors. Rutherford was not in the slaughtering business; the Kaiser Company was. Rutherford was in need of boned meat; the Kaiser Company had boned meat to sell. It is perfectly natural, therefore, that these two corporations should have had such business transactions as are herein recited.

The foregoing details, relative to the two corporations, are stated in order to clarify the relationship between these two corporations. Since May, 1944, Rutherford has been a very profitable customer of Kaiser Company and that company, by furnishing boned meat to Rutherford, has assisted it materially. But these facts do not make Rutherford and the Kaiser Company the same corporation. In fact, all of these transactions are business transactions which might occur between individuals who had absolutely no interest in each other. In this connection the foregoing facts are immaterial except for the purpose of considering the contention of the plaintiff that during the time that Rutherford had the Kaiser plant under lease, it was guilty of the same infractions of the Act as was the Kaiser Company, and this court does not hesitate to state that the record does not support the contention of the plaintiff relative to violations of the Act in regard to Rutherford any more than it does to the Kaiser Company.

The only other question remaining to be determined is with reference to certain individual employees. The facts in relation thereto are fully covered by the stipulation [fol. 163] and in every instance there was a reasonable ground for doing what was done. The record is absolutely silent as to any intention or act on the part of either of these defendants not to fully respect and to carry into effect the provisions of the Act.

An injunction should be granted only to prevent a threatened act, and where the circumstances indicate that, if there has been a violation of the Act, it was unintentional and there is no apparent reason for believing that similar acts would be committed in the future, then there is no basis for an injunction.

The amount of work done by the attorneys in this case

and the amount thereby exacted of the court are out of all proportion to the alleged violations of the Act.

The court finds generally for the defendants. The application for an injunction will be denied as to each defendant. Findings of fact, conclusions of law, and a form of judgment consistent with this opinion may be submitted by the defendants within fifteen days from this date. An exception will be allowed the plaintiff.

Edgar S. Vaught, United States District Judge.

Dated this 2nd day of May, 1945.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law

—Filed May 21, 1945

This cause having been submitted and considered, the court finds the facts and states his conclusions of law as follows:

FINDINGS OF FACT

1. This is an action to enjoin the defendants from violating certain provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U.S.C.A., Sec. 201, et seq.) and regulations of the Administrator issued pursuant thereto.

2. The defendants are both corporations organized [fol. 164] under the laws of the State of Missouri and authorized to do business in the State of Kansas.

3. The defendant The George Kaiser Packing Company, herein referred to as the "Kaiser Company", has its slaughterhouse and principal place of business in Kansas City, Kansas, and the greater portion of the meat produced by it moves into interstate commerce. Since October 15, 1942, about 90% in value of its production has been beef boned to U. S. Army specifications, which has gone to war agencies of the United States, either directly or through processors.

4. The defendant Rutherford Food Corporation, herein referred to as "Rutherford", has its principal place of

business and its plant for processing and canning meat and meat products, principally chili, in Kansas City, Missouri. During the period involved in this suit it has had no plant or place of business in Kansas except that from July 1, 1943, to May 1, 1944, it operated the slaughterhouse of its co-defendant under a written lease, a copy of which is attached to the Stipulation of Facts. Since March, 1943, it has purchased most of the boned beef produced by its co-defendant, and after processing, the canned product has moved into interstate commerce, principally to the army or other war agencies. Rutherford does not have facilities for the slaughtering or boning of beef.

5. In 1942 the United States Government began the purchase of large quantities of beef, boned to Army specification. The Kaiser Company had never done any boning of this character. The Kaiser Company made inquiries as to how to get started in this business and the fact that the said company was interested in securing boners came to the attention of a man named Reed, an experienced boner, who had previously worked in St. Louis packing plants where beef was boned under independent contractors who employed boners and where the work was done on a hundredweight basis. Reed proposed to make a contract with the Kaiser Company on the same basis, and after accepting Reed's proposition said company entered into a written contract with Reed. Reed had associated with him in this character of business a [fol. 165] man named Peterson and while the contract was made directly with Reed, Peterson also signed it.

6. The contract in substance provided that Reed would do the boning at the Kaiser plant, furnish all labor and equipment, such as instruments necessary in said work, for the sum of 40 cents per hundred pounds of boned meat; that the Kaiser Company would furnish the tables on which they were to work, and would provide barrels, properly cleansed from time to time, in which the various types of boned meat, bones and other products from the carcasses were to be placed. The Kaiser Company also agreed to furnish Reed all carcasses of beef for boning ordered from it by the United States Government or by canning organizations working on government contracts. Reed

was required to complete the boning of all carcasses furnished him each day and in addition to the boning, was to strip and remove certain inedible portions such as leaders, glands and clots, and was required to cut the carcasses into boneless chucks, ribs; plates, loins and rounds.

7. The contract further provided that Reed was to perform the work "as an independent contractor in the vestibule of the Kaiser Packing Plant." The Kaiser Company agreed to deliver the carcasses to Reed on the overhead rail, in the vestibule, and pick up the boned meat and waste after it had been sorted by Reed in the barrels which the Kaiser Company was to furnish. Reed was required to perform the work in compliance with government specifications and regulations, and under and in accordance with the approval and direction of all government inspectors. Reed agreed to employ, compensate and be responsible for all of his employees, who would be under and subject to his sole direction and control and the Kaiser Company had no right to supervise or direct the work of Reed or any of his employees. Reed also agreed to carry workmen's compensation and employer's liability insurance and to protect, indemnify and defend the Kaiser Company from and against any injuries to persons or property caused by him or any of his employees. Reed agreed that neither he nor his employees would interfere with ingress or egress of the Kaiser [fol. 166] Company's employees or the carrying of products through the vestibule.

8. The beef when boned was to be packed in separate boxes, each containing one hundred pounds of boned beef, and the Kaiser Company agreed to keep a record of the weights, subject to the inspection of Reed, and to furnish Reed with a daily copy thereof, settlements for the contract price to be made on a weekly basis running from Thursday of each week through Wednesday of the following week, payment to be made Reed by the Kaiser Company within two days after such settlement.

9. Reed also agreed that all of his employees should be affiliated with the CIO and neither party should be liable for failures occasioned by breakdowns, strikes, acts of God, or other unavoidable contingencies. Reed was to

commence his work October 15, 1942, and continue for the duration of hostilities subject to termination by either party on two weeks' notice.

10. Reed and Peterson immediately assembled a crew of boners and carried on the contract until February, 1943, at which time Reed left the work and Adolph Schindel, an experienced boner then working at the plant, took over the boning under an oral agreement to continue on the terms of the Reed contract. He assembled a similar crew of boners and carried on the contract for a year and three months. In May, 1944, Schindel gave up the work and it was taken over by Hooper and Deere, who were then working under Schindel, as boners. Hooper executed a written contract with the Kaiser Company on October 28, 1944, which is still in force. The provisions of that contract are substantially the same as those of the agreement between Reed and the Kaiser Company executed in October, 1942, except that it provides for $100 monthly rental for the vestibule and the maximum quantity of beef that might be required to be boned was raised to 40,000 pounds per day and the consideration raised to 45 cents per hundredweight, which raise had been in effect since January, 1944, under the Schindel contract. No rental has been paid for the reason that Hooper contends that other conditions have not been complied with.

[fol. 167] 11. Reed and his successors used different methods for compensating the boners, but sharing has been the predominant method. During the periods that the checks were payable to Reed and to Schindel, there was an equal division of the boning money among all the boners, except one or two part-time or inexperienced boners who were paid by the hour. However, during the period from May, 1944, to October 1944, the money paid to Hooper was divided equally between Hooper and Deere, after paying three or four boners they hired from time to time at the rate of $1.35 to $1.50 per hour, except that toward the end they cut in a couple of other boners on the split. Since November, 1944, the money paid to Hooper has been divided equally among all the boners, including Hooper.

12. Weekly checks have been paid to the contractor for the meat boned on a hundredweight basis. All checks

were made payable to Reed from October 1942 until February 1943; all checks from February, 1943, until May, 1944, were made payable to Schindel; and since May, 1944, all checks have been made payable to Frank Hooper.

13. A competent group of boners average about 350 to 400 pounds of boned meat per man per hour, which at $.45 per hundredweight is the equivalent of $1.57½ to $1.80 per hour per man. Since Hooper and Deere took over in May, 1944, boners paid on an hourly basis have been paid time and a half for overtime, though prior thereto hourly paid workers did not receive overtime pay.

14. All the boners were engaged by Reed or his successors and the plant operator at no time exercised any direction or control over who should work as boners or engaged the services of any boner or made any arrangement, contract or agreement with respect to compensation with any boner except in the instances of the aforementioned contracts with Reed and his successors.

15. The plant operator has had nothing to do with the wages, rate of pay or amount received by any individual boner and never exercised any direction or control over any sharing or division of the boning money, nor even had direct knowledge thereof.

[fol. 168] 16. The boners have determined their own hours of work and the plant operator has not controlled nor had the right to control the hours they worked or should work. The boners sometimes worked only three or four hours a day, other days they worked fully eight hours, and only in rare instances did they ever exceed eight hours a day. Because they sometimes worked six days a week, they worked 42 to 45 hours a week about half of the time during the period in controversy.

17. The boning is done under constant army inspection in a room at the Kaiser plant set aside for that purpose. The boners furnished their own tools and determined among themselves the division of the steps of the boning process. Boning is a rather special art and not open to the ordinary laborer without training and experience.

18. The plant operator has never treated the boners as its employees and has not included them in the classifica-

tions of employees in its contracts with the CIO Union; they have not been included in its workmen's compensation policy; and they have not had deductions made for unemployment compensation or withholding taxes, etc.

19. The contracts with Reed and his successors were not merely sham and deceptive arrangements, but were necessitated by the exigencies of the situation confronting the Kaiser Company in October, 1942.

20. The contracts with Reed and his successors raise no inference of any intent to impose hardships or substandard working conditions on the boners. Individual boners received amounts far in excess of the minimum prescribed by the Act and their hours were not inconsistent with those provided in the Act.

21. The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the [fol. 169] other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be equitably taken care of by payment on an hourly basis out of the boning money. There is nothing in the contract to prevent the contractor or the group from paying overtime to the boners who work on an hourly basis, which plan was practiced by Hooper since he took over in May, 1944, and which was in effect at the date on which this suit was filed.

22. It has not been uncommon in the packing industry to use independent contractors as a method of obtaining quantity production of boned beef.

23. Complaint is made by the plaintiff as to individuals, other than boners. These individuals were employees of The George Kaiser Packing Company or of the Rutherford Food Corporation during the period it operated the slaughterhouse under the lease above referred to (one of them, Askins, was a Rutherford employee throughout the

entire period). As to all of them the alleged violation was minor and there was a reasonable ground for the employer doing what was done. A good faith effort has been made to comply with the Act with respect to these individuals and the record is silent as to any intention or act on the part of either of the defendants not to fully respect and carry into effect the provisions of the Act.

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter of this suit under the provisions of the Fair Labor Standards Act of 1938.

2. The relation of employer and employee did not exist between the defendants and the beef boners and the defendants did not suffer or permit the boners to work for them within the meaning of the Fair Labor Standards Act of 1938.

3. The plan adopted for getting beef boned in the Kaiser plant was not contrary to the principles of the Fair Labor Standards Act.

4. The plaintiff has failed to sustain the burden resting upon him to prove the allegations of his petition as to [fol. 170] alleged violations of the Fair Labor Standards Act and the probability of future violations so as to justify the issuance of an injunction as prayed.

5. Plaintiff has not shown cause for permanently enjoining and restraining defendants from violating the provisions of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act.

6. A judgment will be entered finding the issues for the defendants and dismissing the plaintiff's complaint.

It Is So Ordered and that these findings and conclusions be filed and that judgment be entered in accordance herewith, entry to be furnished by counsel for defendants. An exception will be allowed the plaintiff.

Dated this 19th day of May, 1945.

Edgar S. Vaught, United States District Judge Assigned.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed May 21, 1945

This cause having come on regularly for trial on the 24th day of January, 1945, the parties appeared by their respective attorneys and submitted the case upon a Stipulation of Facts and the depositions of three witnesses. In open court it was stipulated that the cause might be considered and determined outside the District of Kansas, by the undersigned United States District Judge assigned to the District, on briefs to be submitted by the parties. The cause thereupon being so submitted and the Court having considered the evidence and the arguments of counsel and being fully advised in the premises, in accordance with its Findings of Fact and Conclusions of Law, does find the issues for the defendants and against the plaintiff and that plaintiff's petition should be dismissed. [fol. 171] Wherefore, it is Ordered, Adjudged and Decreed that the prayer of plaintiff's complaint should be denied and that said complaint and this action be dismissed on the merits.

Dated this 19 day of May, 1945.

Edgar S. Vaught, United States District Judge Assigned.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 4, 1945

Notice is hereby given this 2nd day of August, 1945, that the plaintiff, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment of this Court entered on the 21st day of May, 1945.

William S. Tyson, Acting Solicitor; Bessie Margolin, Assistant Solicitor; Reid Williams, Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: Office of the Solicitor, United States Department of Labor, 3000 Fidelity Building, Kansas City, Missouri, or Office of the Solicitor, United States Department of Labor, Washington, D. C.

[File endorsement omitted.]

[fol. 172] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed August 4, 1945

To the Clerk of the Above Named Court:

In accordance with the provisions of Rule No. 75 of Federal Rules of Civil Procedure for the District Court of the United States, the appellant, L. Metcalfe Walling, plaintiff herein, hereby designates the entire and complete record, proceedings and evidence herein as the record on appeal.

In accordance with Rule 75(g) of Federal Rules of Civil Procedure, you are hereby requested to make a transcript of the record, proceedings and evidence, to be contained in the record on appeal, and to transmit same to the United States Circuit Court of Appeals for the Tenth Circuit, pursuant to the Notice of Appeal filed in the above entitled cause, such transcript to contain the following:

1. Complaint
2. Separate Answers of Defendants, Rutherford Food Corporation and The George Kaiser Packing Co.
3. Stipulation—Agreed Statement of Facts
4. Depositions of Thelma Anderson, Frank Hooper and Paul O. Kaiser
5. Opinion of Honorable Edgar S. Vaught, District Judge, filed on May 3, 1945
6. Findings of Fact and Conclusions of Law and Judgment Entry of Honorable Edgar S. Vaught dismissing Complaint filed on May 21, 1945
7. Notice of Appeal
8. This Designation of the Record on Appeal.

Since the complete record and all the proceedings and evidence in this action is designated as the Record [fols. 173-174] on Appeal, a statement of points of the appeal under Rule 75(d) of the Federal Rules of Civil Procedure is omitted herefrom.

William S. Tyson, Acting Solicitor; Bessie Margolin, Assistant Solicitor; Reid Williams, Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: Office of the Solicitor, United States Department of Labor, 3000 Fidelity Building, Kansas City, Missouri, or Office of the Solicitor, United States Department of Labor, Washington, D. C.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 175] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

Record Entry: Cause Argued and Submitted

Seventy-fifth Day, November Term, Tuesday, March 26th, A. D. 1946. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, Faye Blackburn appearing for appellant, E. R. Morrison, Esquire, appearing for appellees.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

Faye Blackburn (William S. Tyson, Acting Solicitor, Bessie Margolin, Assistant Solicitor, Reid Williams, Regional Attorney, David Lichtenstein and Eugene Green, Attorneys, United States Department of Labor, were with her on the brief) for Appellant.

E. R. Morrison (Homer H. Berger, R. L. Hecker, Morrison, Nugent, Berger, Hecker & Buck were with him on the brief) for Appellees.

Before Phillips, Bratton and Huxman, Circuit Judges.

OPINION—July 18, 1946

Bratton, Circuit Judge:

The Administration of the Wage and Hour Division, Department of Labor, brought this action against The George Kaiser Packing Company, hereinafter referred to as Kaiser, and Rutherford Food Corporation, hereinafter referred to as Rutherford, to enjoin the continuation of alleged violations of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §201, et seq.

Section 2(a) of the Act contains a Congressional finding of the prevalence in industries engaged in commerce or in the production of goods for commerce of certain [fol. 176] evils arising out of low wages and long working hours which are detrimental to commerce. Section 2(b) declares the policy of the Act to be the elimination of such conditions without substantial curtailment in employment or earning power. Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof". Section 3(d) defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ." Section 3(e) defines "employee" to include "any individual employed by an employer". Section 3(g) provides that "employ" shall include "to suffer or permit to work". Section 6 relates to minimum wages of employees. Section 7 addresses itself to maximum hours of such employees and provides for increased compensation for work performed in excess of the maximum hours specified. Section 15 provides that it shall be unlawful "to transport, offer for trans-

portation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 . . ." And section 17 vests in the district courts of the United States jurisdiction to restrain violations of Section 15.

Kaiser owns a slaughterhouse plant in Kansas City, Kansas, and Rutherford owns a canning plant in Kansas City, Missouri. Rutherford had contracts to furnish the armed forces of the United States large quantities of canned chili and it was meeting difficulty in obtaining an adequate supply of boned beef for that purpose. In March, 1943, for the primary purpose of obtaining a steady supply of boned beef, Rutherford acquired the controlling interest in Kaiser and also acquired an outstanding debenture issued by Kaiser in the sum of $10,000. Thereafter, Rutherford advanced money to Kaiser from time to time resulting in Kaiser becoming indebted to Rutherford for more than $50,000 on open account, in addition to the debenture. To avoid further operation of Kaiser at a loss and to assure itself a future supply of meat, Rutherford, on July 1, 1943, leased the slaughterhouse [fol. 177] plant from Kaiser, transferred all of the employees of Kaiser to its own payroll without change in payroll practices, and operated the plant until May 1, 1944, at which time the lease was cancelled by mutual agreement. Kaiser then resumed operation of the plant with no material alteration in payroll practices. Prior to March, 1943, there was little or no business connection between the two companies. After termination of the lease, more than ninety-five percent of the output of meat at the plant was sold to Rutherford, virtually all of which was used in the production of chili, and virtually all of the chili moved in commerce.

Prior to October, 1942, Kaiser employed a combined butcher, beef boner, and order filler in the cooler of the plant. In October, 1942, when Kaiser undertook to produce boned beef for war agencies, it needed additional boners. It entered into a written contract with Reed and Peterson, two experienced boners, which provided that Reed should do the boning at the plant for forty cents per hundred pounds of boneless beef; that he should

perform the work as an independent contractor; that he should employ and compensate his employees; that his employees should be subject to his sole direction and control; and that Kaiser should not have the right to direct or supervise the work of Reed or his employees. Reed and Peterson assembled a group of boners consisting generally of themselves and about four others and did the boning for about four months. Reed and Peterson then abandoned the work without notice and Schindel, an experienced boner working at the plant, took it over under an oral agreement with Kaiser to continue under the terms of the contract with Reed. Schindel assembled a similar group and they did the work for about fifteen months. Schindel then quit without notice and the work was taken over on the same basis by Hooper and Deere, both of whom had been working at the plant as boners. After about five months Deere withdrew and Hooper then entered into a written contract with Kaiser. The contract was substantially similar to the one entered into with Reed, except in two respects. It provided that the price should be forty-five cents per hundred pounds of boneless beef and that a rental of $100 per month should be paid for the room in the plant in which the boning was done, but no rent was ever paid. Hooper and the group of boners assembled by him then did the boning. Throughout these several arrangements, the [fol. 178] amount due for the boning was paid in weekly lump sums to Reed, Schindel, Hooper and Deere, and Hooper, respectively, and the amount was then divided among the boners, including those just mentioned by name. Most of the boners worked in excess of the maximum hours per week specified in the Act, without receiving any overtime compensation for the overtime worked, and the plant operator has not kept any records relating to the time they actually worked.

The first step in the operation of the plant is to move the cattle from the holding pen into a room where they are killed, skinned, and dressed. The carcasses are then moved by means of an overhead rail system into the hot cooler, then to the main cooler, and then into the boning vestibule. While the carcasses are still on the rail in the boning vestibule, the persons moving them in there make a final check and remove any small pieces of

hide, fat, or dirt, after which the carcasses are weighed on the rail scale and switched onto the boners' detour rail. They are then boned. The division among the boners of the different steps in the boning is determined by the boners. As the meat is removed from the bones it is thrown into barrels or to a trimmer. As the barrels are filled they are removed from the boning vestibule to the dock, weighed, put on trucks, and hauled to Rutherford or other purchaser. The barrels are washed in a room at one end of the dock. The persons moving the carcasses into the boning vestibule, the trimmer in the boning vestibule, the persons who bring the barrels into the boning vestibule, and the persons who move the boned beef from the boning vestibule to the dock are all employees of the plant operator. The tables, barrels, and rails in the vestibule are owned by Kaiser, but the boners furnish their own hooks, knives and leather belts. The plant operator furnishes the aprons worn by the boners and has them laundered. The boners determine their hours of work, but they are required to keep the work current and the hours they work depend in large measure upon the number of cattle slaughtered. The president and manager of Kaiser is all over the plant many times a day. He goes into and through the boning vestibule on an average of a dozen times a day, and he is after the boners frequently about their failure to cut all of the [fol. 179] meat off the bones. The plant had continuous successive union contracts since 1941 with the local union of the C.I.O. which provided for a closed shop and check-off system and for recognizing the union as the sole collective bargaining agency for all maintenance, piece workers, and production workers in the plant. Jobs were classified and wage scales and conditions were determined by these contracts. The boners were not classified or mentioned in any of the contracts and the union did not ask that they be brought under the plant contracts, but the union required that all boners be members of the union. The boners were members of the union, but the plant operator did not collect their dues and the check-off system was not made applicable to them. The plant operator never included the boners in its Workmen's Compensation liability policy and never made any deductions for unemployment compensation or withholding taxes. Neither did the plant

operator make any application to the Regional War Labor Board for approval of sums or rates paid to boners collectively or individually. Apart from the boners, a small number of employees of the plant operator regularly worked in excess of the maximum hours per week but received no overtime compensation for their overtime hours. In some instances inaccurate records were maintained, and in some wages were paid out of petty cash with no record of the time worked.

Entertaining the view that the boners were not employees of Kaiser, within the meaning of the Act, but were independent contractors; and entertaining the further view that the violations of the Act in respect of the small number of employees of Kaiser were minor and without fixed purpose to disregard the Act, the court denied the injunction and the Administrator appealed.

The strongly contested issue to which the parties devote most of their argument is whether the boners were and are employees of Kaiser, within the purview of the Act, or were and are independent contractors. In respect of coverage of employees, the definitive provisions of the Act are extremely comprehensive in their sweep. United States v. Rosenwasser, 323 U.S. 360. The Act is remedial and must be given a liberal construction with its mani- [fol. 180] fest intent and purpose in view. E. C. Schroeder Co. v. Clifton, 153 F. (2d) 385, certiorari denied, —— U.S. ——; Fleming v. Hawkeye Pearl Button Co., 113 F. (2d) 52; Bowie v. Gonzales, 117 F. (2d) 11; Fleming v. Palmer, 123 F. (2d) 749, certiorari denied, 316 U.S. 662; Helena Glendale Ferry Co. v. Walling, 132 F. (2d) 616. And in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other. Cf. National Labor Relations Board v. Hearst Publications, 322 U.S. 111.

It has been frequently held in cases involving liability in damages for tort that the relation of master and servant exists where the employer has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while an independent contractor is one who engages to per-

form service for another according to his own method and manner, free from direction and control of the employer in all matters relating to performance of the work, except as to the result or the product. And that test along with others has been taken into consideration in determining whether a group of workers were within the coverage of the Act, supra. Jones v. Goodson, 121 F. (2d) 176. But it is not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law, and if it expressly or by fair implication brings within its ambit workers in the status of these boners, it is immaterial whether under the principles of the common law the relationship between Kaiser and the boners has been that of employer and independent contractor for other purposes. Walling v. American Needlecrafts, Inc., 139 F. (2d) 60.

The operations at the slaughterhouse constitute an integrated economic unit devoted primarily to the production of boneless beef. Practically all of the work entering into the unit is done at one place and under one roof. Part of it precedes that of the boners and part follows, but there is no break in continuity. The boners work alongside admitted employees of the plant operator at [fol. 181] their tasks. The task of each is performed in its natural order as a contribution to the accomplishment of a common objective. The work of all is interrelated and co-acts in making up the single economic unit. The work of the several employees, including the boners, bears marked similarity in interrelated association and effect to that of employees at a conventional assembly-line production plant. In addition to Kaiser furnishing without payment of any rental the room in which the boning is done, to keeping it clean, and to paying the agreed price for the boning, the manager of the plant is in the room from time to time every day observing the work and complaining to the boners that too much meat is being left on the bones. These underlying economic realities, considered in their composite effect, lead to the conclusion that the boners were and are employees of Kaiser, within the meaning of the Act. Fleming v. Palmer, supra; Walling v. American Needlecrafts, Inc., supra.

This brings us to the part of the case relating to the

other employees in respect of whom there has been a failure to comply with the provisions of the Act. In a case of this kind the trial court is vested with broad discretion in determining whether an injunction should issue. Walling v. Mid-Continent Pipe Line Co., 143 F. (2d) 308. But the discretion must be exercised with due regard for the objectives of the Act. Lenroot v. Interstate Bakeries Corp., 146 F. (2d) 325. And while the action of the court in withholding the issuance of an injunction ordinarily will not be distributed on appeal, in view of the extent of the violations of the Act, their nature, the period of time over which they extended, and the other circumstances reflected in the record, we think the court should have enjoined their continuation or the commission of like violations in the future.

The judgment is reversed and the cause remanded for the entry of a judgment substantially as prayed for in the complaint.

[fol. 182] CONCURRING OPINION

PHILLIPS, Circuit Judge, concurring:

Rule 52 of the Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly erroneous, * * *" On appeal, a finding of fact made by the trial court, if supported by substantial evidence, is binding on this court.[1]

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[1] United States v. Linde, 10 Cir., 71 F. 2d 925;
Board of Com'rs of Caddo County, Okl., v. United States, 10 Cir., 87 F. 2d 55, 57;
Nielsen v. General American Life Ins. Co., 10 Cir., 89 F. 2d 90, 93;
McCarthy v. Wynne, 10 Cir., 126 F. 2d 620, 623;
Viles v. Prudential Ins. Co. of America, 10 Cir., 107 F. 2d 696, 698, 699;
Ryan v. Denver Union Terminal Ry. Co., 10 Cir., 126 F. 2d 782, 784.

The credibility of witnesses, the weight to be given to their evidence,[2] and the inferences which may be reasonably drawn from the evidence are matters within the province of the trial court.[3]

Here, the trial court found that in 1942 the United States government began purchasing large quantities of beef boned to Army specifications; that the George Kaiser Packing Company[4] had never done any such boning; that Kaiser made inquiries respecting boners which came to the attention of Jim Reed, an experienced boner, who had previously boned beef under independent contractors who employed boners and did the work on a hundredweight basis; that Reed proposed to bone beef for Kaiser on the same basis; that, thereupon, Kaiser entered into a contract with Reed for the boning of all meat ordered from Kaiser for canning; that in such contract, it was agreed [fol. 183] that Reed would furnish all labor and equipment and bone the meat; that Reed should receive 40 cents per hundred pounds of boned meat; that Kaiser would furnish the tables on which the boners were to work and provide barrels, properly cleansed from time to time into which the various types of boned meat, bones, and other portions of the carcasses were to be placed; that Kaiser would deliver to Reed, for boning all carcasses of beef ordered from it by the United States govern-

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[2] National Mut. Casualty Co. v. Eisenhower, 10 Cir., 116 F. 2d 891, 895;
Camden Woolen Co. v. Eastern S. S. Lines, 1 Cir., 12 F. 2d 917, 919;
Flack v. Holtegel, 7 Cir., 93 F. 2d 512, 515;
Kincade v. Mikles, 8 Cir., 144 F. 2d 784, 787;
Columbus Outdoor Advertising Co. v. Harris, 6 Cir., 127 F. 2d 38, 42.

[3] Limbach v. Yellow Cab Co., 7 Cir., 45 F. 2d 386, 387;
United States v. Gamble-Skogmo, 8 Cir., 91 F. 2d 372, 374;
Continental Petroleum Co. v. United States, 10 Cir., 87 F. 2d 91, 95;
Grip Nut Co. v. Sharp, 7 Cir., 150 F. 2d 192, 196;
Bradley v. Smith, 7 Cir., 114 F. 2d 161, 165;
Kincade v. Mikles, 8 Cir., 144 F. 2d 784, 787.

[4] Hereinafter called Kaiser.

ment, or by canners working on government contracts; that Reed would complete, each day, the boning of all carcasses delivered to him by Kaiser; that Reed should perform the work "as an independent contractor in the vestibule of the Kaiser Packing Plant"; that Kaiser would deliver the carcasses to Reed on the overhead rail in the vestibule and pick up the boned meat and waste after it had been placed in the barrels by Reed; that Reed would perform the work in compliance with government specifications and regulations, and in accordance with the directions of government inspectors; that Reed would employ, compensate, and be responsible for all of his employees; that such employees should be under and subject to the sole direction and control of Reed, and that Kaiser would have no right to supervise or direct the work of Reed or any of his employees; that Reed would carry workmen's compensation and employer's liability insurance and protect, indemnify, and defend Kaiser from and against any injuries to persons or property caused by Reed or any of his employees; that the beef, when boned, would be packed in separate boxes, each containing one hundred pounds of boned beef; that Kaiser would keep a record of the weights, subject to Reed's inspection, and furnish Reed with a daily copy thereof; that settlements at the contract price would be made on a weekly basis running from Thursday of each week through Wednesday of the following week; that the contract would continue in force from October 15, 1942, through the duration of the war, subject to the right of either party to terminate it on two weeks' notice.

The court further found that Reed assembled a crew of boners and carried on the work under the contract until February, 1943, at which time Reed ceased performance of the contract; that Schindel, an experienced boner then working for Reed, orally agreed to continue the work [fol. 184] under the terms of the Reed contract; that Schindel assembled a crew of boners and carried on the work for one year and three months; that in May, 1944, Schindel ceased performance of the contract and Hooper and Deere, who were then working for Schindel as boners, took over the contract; that Hooper executed a written contract with Kaiser on October 28, 1944, which is still in force; that the Hooper contract is substantially the same as the Reed contract, except that the former pro-

vides that Hooper shall pay $100 monthly rental for the vestibule; that the maximum quantity of beef that may be required to be boned shall be 40,000 pounds per day, and the price shall be 45 cents per hundredweight; that Reed and his successors used different methods for compensating the boners, sometimes paying them on an hourly basis, but that sharing has been the predominant method; that from May, 1944, to October, 1944, the money paid for the boning was divided equally between Hooper and Deere, and they paid their boners on an hourly basis; that since November, 1944, the money paid to Hooper has been equally divided among the boners, including Hooper; that Kaiser has paid for the boning by weekly checks issued to the contractor; that all the boners were engaged by Reed or his successors; that at no time has Kaiser exercised any direction or control over the boners, hired any boners, or made any arrangements or agreements with respect to the compensation of any boner; that Kaiser has had nothing to do with the wages, rate of pay or amount received by any individual boner and has never exercised any direction or control over the sharing or division of the boning money; that the boners determined their own hours of work and Kaiser has not controlled and has not had the right to control their hours of work; that the boners sometimes worked only three or four hours a day, on other days worked eight hours, and, in rare instances worked in excess of eight hours; that they sometimes worked six days a week, aggregating 42 to 45 hours; that the boners furnished their own tools and determined among themselves the division of the steps in the boning process; that boning is a special art, requiring training and experience; that Kaiser has never treated or classified the boners as its employees, has not included them in its workmen's compensation policy, and [fol. 185] has not made deductions for withholding taxes; that the plan under which the boners worked is one commonly used in other packing plants; that the contracts with Reed and his successors were not sham and deceptive arrangements, but were necessitated by the exigencies of the situation confronting Kaiser when it entered into the contract with Reed.

The trial court found the same facts with respect to the

Rutherford Food Corporation[5] during the period it operated the plant.

The findings of fact made by the trial court and the inferences drawn by the trial court from the evidence find substantial support in the evidence.

Whatever might be our conclusion, if we were free to determine the issues of fact and the inferences to be drawn from the evidence, I do not think we are warranted, in the light of the facts found by the trial court, to draw the conclusion that the boners were employees of either Kaiser or Rutherford.

It is my opinion, however, that the evidence disclosed other violations of the Fair Labor Standards Act by Kaiser and Rutherford with respect to persons directly in their employ and that an injunction should have been granted in respect to such violations. See Walling v. Mid-Continent Pipe Line Co., 10 Cir., 143 F. 2d 308, and Bowles v. Nu Way Laundry Co., 10 Cir., 144 F. 2d 741.

IN UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

JUDGMENT.

Thirty-fourth Day, May Term, Thursday, July 18th, A. D. 1946. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

[fols. 186-188] On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for the entry of a judgment substantially as prayed for in the complaint.

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[5] Hereinafter called Rutherford.

[fol. 189] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLEES FOR REHEARING—Filed August 7, 1946

To the United States Circuit Court of Appeals for the Tenth Circuit and the Honorable Judges Thereof:

Come now Rutherford Food Corporation and The George Kaiser Packing Company, the appellees in the above entitled cause, and present this, their petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

[fol. 190] For brevity one petition is filed for rehearing on the part of both appellees, but appellees ask that the Court consider the petition as having been severally made inasmuch as there is one point herein which applies solely to Rutherford Food Corporation whose factual situation is materially different from that of The George Kaiser Packing Company, inasmuch as Rutherford was operating the business only for a limited time and had ceased to operate the business before this suit was filed.

Appellees pray that the opinion and judgment as reversed be set aside and a rehearing and reargument granted on the grounds that the Court has overlooked or misconstrued important and material facts, has failed to give effect to decisions which have a direct and controlling bearing upon the decision of the case and has decided the case according to wrong principles.

(1)

The Contracts with Reed and His Successors Were in Accord with Common Practice in This Industry and Were Admittedly Bona Fide and Without Purpose to Evade the Act.

In the oral argument it was admitted by counsel for the administrator that the contract with Reed was not made for the purpose of evading the provisions of the Fair Labor Standards Act. No claim of any purpose of evasion is made in the briefs and the trial court specifically found that the contracts were not sham or deceptive arrangements but were necessitated by the exigencies of the situation confronting the Kaiser Company in

October, 1942; the trial court further found that there was no inference of any intent to impose substandard working conditions on the boners and that they received amounts far in excess of the minimum prescribed by the [fol. 191] act and that the hours were not inconsistent with those provided in the act (R. 168). The trial court further found as follows:

> "21. The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be equitably taken care of by payment on an hourly basis out of the boning money. There is nothing in the contract to prevent the contractor or the group from paying overtime to the boners who work on an hourly basis, which plan was practiced by Hooper since he took over in May, 1944, and which was in effect at the date on which this suit was filed.
>
> "22. It has not been uncommon in the packing industry to use independent contractors as a method of obtaining quantity production of boned beef" (R. 168, 169).

The contracts did not limit the subcontractor to any particular method of compensation of the boners or to any particular method of division of the money paid. It was specifically stipulated (R. 23), and it was found by the trial court (R. 167) that,

> "15. The plant operator has had nothing to do with the wages, rate of pay or amount received by any individual boner and never exercised any direction or control over any sharing or division of the boning money, nor even had direct knowledge thereof."

[fol. 192] It was further shown by the evidence and found by the trial court that different methods were used by Reed and his successors for compensating the boners; sharing had been the predominant method and during the periods that the checks were payable to Reed and Schindel, there was an equal division of the boning money except as to one or two part-time or inexperienced boners who were paid by the hour. However, from May to October, 1944, Hooper and Deere were the subcontractors and they hired three or four boners that they paid at the rate of $1.35 to $1.50 per hour, except toward the end when they cut in a couple of other boners on the money that was split between Hooper and Deere (R. 167). A competent group of boners average $1.57½ to $1.80 per hour per man and ever since May, 1944, boners paid on an hourly basis have been paid time and a half for overtime and this condition existed up to the time of trial (R. 167).

The trial court further found as follows:

> "14. All the boners were engaged by Reed or his successors and the plant operator at no time exercised any direction or control over who should work as boners or engaged the services of any boner or made any arrangement, contract or agreement with respect to compensation with any boner except in the instances of the aforementioned contracts with Reed and his successors" (R. 167).

The circumstances under which the contract was entered into are important. This arrangement is not one that was proposed or devised by Kaiser. On the contrary it is specifically stipulated that Kaiser, desiring to get into the business of furnishing boned beef, made inquiries which came to the attention of Reed and that Reed advised Kaiser that he had worked for two packing companies in St. Louis under the plan which was [fol. 193] embodied later into the contract between the Kaiser Company and Reed and Peterson (R. 16, 17, Pars. 18, 19).

These facts are also found by the trial court (R. 164) and of course are undisputed.

There was a specific reason for this arrangement. Boners were hard to get and were in great demand after

the war started. This is shown in the testimony (R. 104) and is conceded in appellant's brief (p. 7). This is not a situation where the plant operator had the upper hand in bargaining and attempted to impose substandard conditions, but rather it is a situation where the workers demanded and got what they wanted. If they had wanted to be on the plant operator's payroll, they undoubtedly would have asked to be and would have gotten what they wanted. The "economic realities" are that they did not want to be employees and that they were better off as to compensation, hours and working conditions under the arrangement they selected.

(2)

Kaiser and Rutherford Had No Contract to Pay Wages to the Boners and the Court Does Not Have the Power to Create Such a Contract.

The only contract that either Kaiser or Rutherford had was a contract to pay for the boning of beef at 40c (later 45c) per hundredweight. This contract with Reed provided that Reed "shall employ, compensate and be responsible for all of his employees; that his employees shall be under and subject to his sole direction and control and shall not be subject to the direction or control of Kaiser's" (R. 33, Par. 7).

Reed further agreed to carry Workman's Compensation and Employers' Liability Insurance covering all of [fol. 194] his employees (R. 34, Par. 8). The contract also provided that,

> "* * * Kaiser's shall deliver said carcasses to Reed on the rails in said vestibule, and Kaiser's shall pick up the boned meat * * * Kaiser's shall also furnish and wash all barrels required for the sorting of said items" (R. 33, Par. 4).

The court in its opinion does not specifically hold that there was any contract on the part of the plant operator to pay compensation to the boners direct, but this is the effect of the decision which holds that "the boners were and are employees of Kaiser within the meaning of the Act" (Op. p. 7). It is evident that this creates a situation of serious import.

We submit that the court has erred in the conclusion it has reached and that the facts upon which the conclusion is based are not such as to create an obligation to pay wages on the part of the plant operator.

(3)

Under Similar Facts the Courts Have Repeatedly Held That It Is Not the Purpose of the Act to Create Contractual Liability Where None Exists

The leading case on this question is Bowman v. Pace Co., (C. C. A. 5, 1941) 119 F. 2d 858. This case holds that under the Fair Labor Standards Act an employer has the right to contract with a third person to employ workmen to do the exact work which had previously been performed by employees. In that case the contractor at first took over the same employee who had been working for the defendant and who continued to perform the identical duties for which the defendant had previously employed and paid him. The defendant operated a large wholesale grocery with headquarters in Pensacola, Bow-[fol. 195] man was a watchman employed by a man named Forsyth; who conducted a business which he styled "Gene Forsyth Detective Service." Bowman made a contract with the Pace Company on October 1, 1938, and he was asked to, and did, retain the watchman who was then employed by the Pace Company. This watchman was subsequently discharged and Bowman was hired in his place by Forsyth and paid by Forsyth, but was told that the Pace Company would instruct him what to do. Bowman had other duties besides watching; he kept a record of the arrival and departure of trucks; he gave drivers of departing trucks the bills of the goods they carried and received from the incoming trucks the bills to be turned in to the office; on some occasions he delivered pay envelopes and also had taken charge of money brought in by the drivers; he was required to keep up with the lubricating of the trucks and to arrange for lubrication. In other words, his duties were part of the essential normal every day work required to carry on the business of the Pace Company and keep it going. But it was held that the control exercised by the defendant did not make Bowman any the less the employee of Forsyth as far as wages were concerned.

The court said that if this was a tort case it might be just to hold the defendant responsible for misconduct on the part of Bowman, "but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort."

The court further said in 119 F. 2d l. c. 860:

> "• • • It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work [fol. 196] under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act."

Walling v. Sanders, 136 F. 2d 78 (1943), was decided by the Sixth Circuit Court of Appeals, and the same conclusion was reached as in the Bowman case. The defendant was a wholesale beer dealer who employed salesmen, each of whom was furnished a delivery truck owned by the wholesaler. Most of the salesmen employed drivers whom they paid to drive the truck, help deliver the beer and pick up empty cases. The salesmen were not required to employ drivers. The administrator sought to hold the wholesaler liable for the payment of overtime to the drivers. These drivers were doing a portion of the work for which the salesmen were paid by the defendant. The court held, however, that they were not employed by the dealer and he was not liable to them for overtime.

The Bowman case was cited, quoted and followed by the Eighth Circuit Court of Appeals in Helena Glendale Ferry Co. v. Walling, 132 F. 2d 616 (1942), and by the First Circuit in Reconstruction Finance Corporation v. Merryfield, 143 F. 2d 988 (1943), and in Walling v. Portland Terminal Co., 155 F. 2d 215 (C. C. A. 1, 1946).

The decision in Walling v. American Needlecrafts (C. C. A. 6, 1943), 139 F. 2d 60, also quotes and follows the holding in the Bowman case.

The foregoing decisions have been cited and followed in a number of District Court decisions among which are —Maddox v. Jones, 42 F. Supp. 35 (D. C. Ala., 1941); David v. Boylan's Private Police, 34 F. Supp. 555 (D. C. La., 1940); Lorenzetti v. American Trust Co., 45 F. Supp. 128 (D. C. Calif., 1942); Walling v. Portland Terminal

Co., 61 F. Supp. 345 (D. C. Me., 1945, aff. 155 F. 2d 215); Walling v. Nashville C. & St. L. R. Co., 60 F. Supp. 1004 [fol. 197] (D. C. Tenn., 1945); Dugas v. Nashua Mfg. Co., 62 F. Supp. 846 (D. C., N. H., 1945); Van Hee v. Elmer C. Breuer, Inc., 10 Labor Cases 68,301 (D. C. Ohio, 1945); Schroepfer v. A. S. Abell Co., 48 F. Supp. 88 (D. C. Md., 1942).

This doctrine is so overwhelmingly accepted by the courts that we respectfully ask the court to reexamine the authorities.

(4)

Binding Effect of the Findings of the Trial Court

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part as follows:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The importance of this provision of the rules cannot be minimized. If the findings of the trial court are not to be given effect then a trial *nisi prius* becomes no more than a hearing before a commissioner to take testimony. The office of United States District Judge would be robbed of the dignity and importance with which it has traditionally been clothed.

Nor is the rule without effect because of the fact that the testimony may be by deposition and stipulation. While, as the rule states, the opportunity of the trial judge to see and hear the witnesses is a consideration of importance, nevertheless the determination of the facts and the inferences to be drawn therefrom by the trial judge are not lightly to be set to one side.

Concerning this question it is said in the Advisory Committee Notes, as quoted in Moore's Federal Practice, Volume 3, page 3116:

> [fol. 198] "* * * The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from un-

contradicted testimony. See Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co., 204 Fed. 166 (C. C. A. 8th, 1913), cert. den. 229 U. S. 624 (1913); Warren v. Keep, 155 U. S. 265 (1894); Furrer v. Ferris, 145 U. S. 132 (1892); Tilghman v. Proctor, 125 U. S. 136, 149 (1888); Kimberly v. Arms, 129 U. S. 512, 524 (1889). Compare Kaeser & Blair, Inc., v. Merchants' Ass'n, 64 F. 2d 575, 576 (C. C. A. 6th, 1933); Dunn v. Trefry, 260 Fed. 147, 148 (C. C. A. 1st, 1919)."

This court and the various other Circuit Courts of Appeals have consistently deferred to the rule as is shown by the cases cited in the concurring opinion herein and by many other decisions.

For instance, in United States v. Aluminum Co. of Amer. (C. C. A. 2, 1945), 148 F. 2d 416, it is said in the opinion by Circuit Judge L. Hand:

"• • • It is idle to try to define the meaning of the phrase, 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; • • •."

Again in the case of Andrew Jergens Co. v. Conner (C. C. A. 6, 1942), 125 F. 2d 686, it was said in the opinion by Circuit Judge Hamilton:

[fol. 199] "• • • Where a case is tried by the court, a jury having been waived, the court's findings upon questions of fact are conclusive upon appeal, no matter how convincing the argument that upon the evidence the findings should have been different unless there is no substantial evidence to support them. We are bound by the lower court's findings unless they are clearly erroneous • • •."

It is not contended that the findings of the learned trial judge are not supported by the evidence or that his in-

ferences therefrom are not such as can reasonably be drawn from the facts. We submit that it cannot reasonably be said that the findings are erroneous in any respect.

(5)

Discretion of Trial Court As to Injunction

Since the decision in the case of Hecht Company v. Bowles, 321 U. S. 321, there can be no question but what the issuance of an injunction in a case of this type is discretionary with the court. As stated in the opinion by Mr. Justice Douglas:

> "• • • We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235, *ante*, 9, 13, 64 S. St. 7. The historic injunction process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

[fol. 200] The granting or denial of an injunction is a matter of discretion for the trial court and in the absence of manifest abuse of discretion, an appellate court will not modify or revise the trial court's ruling.

As stated in the case of Bowles v. Huff, 146 F. 2d 428 (C. C. A. 9th, 1944):

> "It was particularly within the province of the trial court to determine from a survey of all the facts and circumstances, whether, in the exercise of sound judicial discretion, an injunction should issue. From the record before us, we are not prepared to say that in this case the refusal of an injunction was such a clear abuse of judicial discretion as to call for a reversal. A decree of a district court, denying an injunction, should not be reversed unless shown to be contrary to some recognized rule of equity or be the result of an improvident exercise of judicial discretion."

What constitutes an abuse of discretion is succinctly stated in Corpus Juris Secundum, Appeal and Error, Section 1583, page 476. It is there said:

> "In determining whether the lower court has abused its discretion the question is not whether the reviewing court agrees with the court below, but rather whether it believes that a judicial mind, in view of the relevant rules of law applicable to the particular case and on due consideration of all the circumstances, could reasonably have reached the conclusion of the court below. The mere fact that the appellate court would have decided otherwise does not establish that the discretion has been abused, nor does a mere mistake or error of law."

There is absolutely nothing in this record to show a manifest abuse of discretion on the part of the trial court in denying an injunction in this case. The trial court specifically found that "a good faith effort has been [fol. 201] made to comply with the (Fair Labor Standards) Act and the record is silent as to any intention or act on the part of either defendant not to fully respect and carry into effect the provisions of the Act" (R. 169). Obviously, the trial court in its discretion thought that an injunction was not necessary to deter defendants from any future violation of the Act, and the sole purpose of an injunction is to prevent future violations, not to punish past ones.

(6)

No Basis for Injunction Against Rutherford Food Corporation

The opinion of the court makes no distinction between The George Kaiser Packing Company and the Rutherford Food Corporation. For a relatively short period of ten months, July 1, 1943, to May 1, 1944, the Rutherford Food Corporation operated the Kaiser plant due to problems arising from war conditions. At the time suit was filed it no longer operated the plant and before the case was tried had ceased to have the slightest financial interest in the Kaiser Company (R. 12-15). It is difficult to see how an injunction against Rutherford would serve any purpose in preventing future violations of the Act.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the District Court be affirmed upon reconsideration.

Respectfully submitted, E. R. Morrison, Homer H. Berger, R. L. Hecker, Attorneys for Appellees. Morrison, Nugent, Berger, Hecker & Buck, of Counsel.

[fol. 202] Certificate of Counsel

The appellees, Rutherford Food Corporation and The George Kaiser Company, by and through their attorneys, hereby certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but, in the opinion of such attorneys, is well founded in law and proper to be filed herein.

E. R. Morrison, Homer H. Berger, R. L. Hecker, Attorneys for Appellees.

[File endorsement omitted.]

[fols. 203-204] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—August 26, 1946

This cause came on to be heard on the petition of appellees for a rehearing herein and submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied, Honorable Orie L. Phillips, Circuit Judge, dissenting.

[An order was entered August 30, 1946, staying the mandate for thirty days from September 5, 1946.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 205] SUPREME COURT OF THE UNITED STATES
No. 562, October Term, 1946

ORDER ALLOWING CERTIORARI—Filed November 12, 1946.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 51,426 U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 562. Rutherford Food Corporation and The George Kaiser Packing Company, Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor. Petition for a writ of certiorari and exhibit thereto. Filed October 2, 1946. Term No. 562 O. T. 1946.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 562

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS,

VS.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

E. R. MORRISON,
HOMER H. BERGER,
Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS,

VS.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Rutherford Food Corporation and The George Kaiser Packing Company pray that a writ of certiorari be issued to review the decree of the Circuit

Court of Appeals for the Tenth Circuit entered in Cause No. 3213 on the docket of the said Circuit Court of Appeals in the May Term, 1946 (R. 185).

HISTORY OF THE CASE.

This suit was brought in the United States Court for the District of Kansas, First Division by Respondent under Section 17, 29 U. S. C., Sec. 201, to restrain petitioners from violating Sections 7, 11(c), 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act.

The facts are undisputed and are covered by a written stipulation supplemented by depositions taken by the Respondent. Judgment was entered in the District Court on May 21, 1945, dismissing the action (R. 171). The trial judge filed a written opinion (R. 150) and made findings of fact and conclusions of law (R. 163).

Upon appeal to the United States Circuit Court of Appeals for the Tenth Circuit, judgment was entered July 18, 1946, reversing and remanding the cause (R. 185).

The majority opinion is by Circuit Judge Bratton and was concurred in by Circuit Judge Huxman (R. 175). Circuit Judge Phillips filed an opinion concurring in the result but dissenting as to the main issue concerning the status of the boners (R. 182).

Petitioners filed a motion for rehearing (R. 189) which was overruled August 26, 1946, by a majority of the court, Circuit Judge Phillips dissenting (R. 203).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347(a), 8 F. C. A., Title 28, Sec. 347(a).

STATUTE INVOLVED.

The case presents the proper construction of Sections 3(d), 3(e), 3(g) and 7(a) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*).

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The George Kaiser Packing Company is the owner of a small meat packing plant in Kansas City, Kansas (R. 11). Rutherford Food Corporation is its chief customer for boned meat (R. 16) and actually operated the plant under a lease for a period of ten months (R. 13). The issues as to both petitioners are identical and for convenience the term "Kaiser" or "plant operator" will be used herein as referring to both.

Kaiser began the production of boned beef for army contracts in October, 1942 (R. 16). At that time he had had no experience in this type of production and he made inquiries with respect to the matter which came to the attention of an experienced boner named Reed (R. 16). Boners were in great demand (R. 104). Reed proposed to Kaiser that he would undertake to assemble a crew of boners and would enter into a contract to do the boning on the basis of a certain price per hundredweight (R. 17, R. 95-7). This method of production is not uncommon in the packing industry (R. 169, 21) and Reed had worked in two plants in St. Louis under similar arrangements (R. 17).

A written contract was entered into under which Reed agreed with Kaiser to bone all carcasses that he required for government contracts on the basis of 40¢ per hundred pounds (R. 17, 32). The boners were to be employed and

paid by Reed, who assumed full responsibility for them and they were to be subject solely to his direction and control. Reed was to furnish his own tools and equipment. Kaiser was to provide tables and a room in the Kaiser plant referred to as the "vestibule" in which the work was to be performed (R. 33-34). Reed was to carry his own Workmen's Compensation and Liability Insurance (R. 34). The work was carried on by Reed and successive contractors under substantially the same terms from October 14, 1942, until the time of trial in January, 1945 (R. 17). The boning was agreed to be done (R. 33) and actually was done under the constant supervision of army inspectors (R. 31).

Kaiser never at any time exercised any direction or control over who should work as boners or engaged the services of any boner and never paid the wages of any boner or made any agreement with them in respect to their compensation (R. 23). He had no control over their hours, the division of the work or the amount or form of their compensation (R. 23). Some of the boners were at times paid by the contractor on an hourly basis at rates of $1.25 to $1.50 per hour (R. 22). The predominant method of payment employed by the contractors and the boners was to share equally any division of the boning money on the basis of hours worked (R. 22), on which basis the amount earned would be about $1.57 to $1.80 per hour (R. 167, 21, 22). This was an equitable method of division (R. 168), because some of the men boned fleshy portions of the carcasses and others boned the more thinly fleshed parts (R. 22). Some weeks the boners worked more than 40 hours, but this was a matter entirely under their control as they determined both the hours of work (R. 23, 65, 67), and also the number of carcasses that they would bone on a particular day (R. 66).

There was nothing in the contract that controlled the manner in which the contractor should pay the boners employed by him, nor was there anything to prevent the payment of overtime (R. 32, 22). In the earlier periods the boners working on an hourly basis were not paid overtime, but at the time of trial and for some months prior thereto, all hourly boners were paid overtime by the contractor (R. 22).

The trial judge found that the contracts raised no inference of an intent to impose substandard working conditions (R. 168), and that the agreements were not sham or deceptive, but were necessitated by the exigencies of the situation that confronted Kaiser in October, 1942 (R. 168). These findings are not controverted by the opinion in the Court of Appeals.

Opinion in the District Court.

In its opinion, the trial court held that there was nothing in the boning contract that was contrary to the purposes of the Act, and that in fact it would be difficult to conceive of a method of doing business that would do more to promote the principles of the Act (R. 158). It was held that the boning was done by independent contractors and that the relation of employer and employee did not exist between the Kaiser Company and the boners. The court cited with approval *Bowman* v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5, 1941) to the effect that it was not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists to measure it by the standards fixed by the law.

Opinion of the Court of Appeals.

In the majority opinion of the Court of Appeals it was held that the boners were employees of Kaiser because the work was being done on his premises, along-

side admitted employees and contributed to the common objective of the plant production. The opinion likened the operation to the conventional factory assembly line. The majority opinion gave no consideration to the fact that there was no contractual relationship existing between Kaiser and the boners, and ignored the decision in *Bowman v. Pace Company* and the numerous cases which follow it. Judge Phillips was of the opinion that the findings and inferences therefrom by the trial court as to the status of the boners should be accepted (R. 182-185).

QUESTIONS PRESENTED.

1. Whether it is (a) the purpose of the Fair Labor Standards Act to create a liability for the payment of wages to persons as to whom no wage liability would otherwise exist or (b) to measure the extent of an existing wage liability which has been created by agreement express or implied?

2. Does the phrase "suffer or permit to work" as used in the Act bring within its scope persons with whom there is no contractual obligation to pay wages either express or implied?

3. Do the purposes of the Act bring employees of an independent contractor into an employer-employee relationship with a plant operator because the contract requires the work to be performed in the plant, in intimate association with the plant operator's employees, and as a contribution to the common object of production, there being no intent to evade the Act?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

Importance of the Questions Presented, Which Have Not Been, But Should Be, Determined by This Court.

No other act pertaining to employer-employee relationships contains the phrase embodied in Section 3(g) of the Act, that "'Employ' includes to suffer or permit to work." Obviously this phrase is intended to have a special meaning. On this the decisions are agreed. As to the exact meaning, there are differences of opinion, though all (except the Tenth Circuit in this case) appear to agree that it is not the purpose of the Act to include all of those whose work is performed for the ultimate benefit of the alleged employer, where there is no agreement to pay compensation express or implied.

Petitioners contend that the language "suffer or permit to work" should be interpreted to mean work done under a contract of employment, or under circumstances that create an obligation to pay wages; they contend that the existence of a liability to pay wages is fundamental and that it cannot be created by questions as to control of the details of the work or as to whether the work is done under a common roof with the admitted employees. The reported cases show that this question has often arisen in lower courts, but it has never been decided by this Court.

It is a question of great importance and this Court should determine the correct interpretation of this phrase.

Equally important is the question presented in this case and never decided by this Court as to whether it is the

purpose of the Act to measure existing wage liabilities or to create new wage liabilities.

The frequency with which this question has arisen, under facts similar to those in the case at bar, shows the necessity for its early determination by this Court. The question is squarely presented for determination here because,

(a) This precise principle was stated and quoted with approval in the opinion by the District Judge, which opinion, and the judgment based thereon, is reversed by the opinion of the Tenth Circuit Court of Appeals;

(b) The majority opinion in the Court of Appeals bases its conclusion that the boners were employees of the plant operator upon facts and circumstances other than the existence of an obligation to pay wages; and

(c) Failure to apply this rule was again called to the attention of the Circuit Court of Appeals in the motion for rehearing (R. 194), which motion was overruled by a majority of the Court, Circuit Judge Phillips dissenting (R. 203).

Reference in the majority opinion to the "conventional assembly line" presents in vivid form the erroneous conception inherent in the majority opinion. The controlling factor, as the majority of the Court saw it, was not the contractual relationship but the physical relationship, which is exemplified by the Court's reference to the work being done under one roof and alongside admitted employees. If the "assembly line" test is valid then every factory owner should know it. If it is not the law, then the uncertainty created by the conflict with numerous other decisions should be promptly dispelled.

The questions involved were not determined by this Court in the decision of this Court in *National Labor*

Relations Board v. Hearst Publications, 322 U. S. 111, because, (1) there was a direct contractual relation between the newsboys and Hearst, (2), this Court was called upon to define the relation, not to create a contractual relation, and (3) in this case, there is no contractual relation between Kaiser and the boners.

II.

The Opinion Is in Direct Conflict with Decisions of Four Other Circuit Courts of Appeals.

There is direct conflict with the following cases.

(1) *Bowman* v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5th, 1941).

The Pace Company made a contract with Forsyth to furnish a watchman at their wholesale grocery plant. The old watchman was continued in service for awhile and subsequently Bowman was employed. Besides the duties of watchman, he gave drivers of departing trucks bills of goods to be carried and received from the incoming trucks bills to be turned into the office; he delivered pay envelopes and also took charge of money brought in by the drivers; kept up with the lubrication of the trucks and arranged for lubrication. Thus, his duties were part of the essential, normal every day work of the company and an integral part of its operations. The court in its opinion by Sibley, C. J., said:

> "The strongly contested issue is whether he was the employee of the Pace Company at all. If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly nor

suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. If the Pace Company, in order to evade the Act, colluded with Forsyth to interpose him as an apparent independent contractor, we would hold him the agent of the Pace Company to hire and pay the watchman, so that Bowman would be the employee of the Pace Company. While that is alleged here, the proof wholly fails to sustain it, * * *"

* * * * * * *

"But it is argued that Bowman was so far under the orders of the Pace Company as that Forsyth was not an independent contractor, * * * If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed., Secs. 665, 680."

(2) *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6th, 1943).

Defendant was a wholesale beer dealer who employed salesmen to each of whom was furnished a delivery truck owned by the wholesaler. These salesmen employed and paid drivers to go with them on the trucks to help them drive, deliver beer and pick up empty cases. The Administrator sought to hold the dealer liable for the payment of overtime to the drivers. The Court said in the opinion by Circuit Judge Simons:

"The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.' But the administrator urges that the term 'employee' as here used is not a word of art but one carefully

defined by the statute. He refers to Section 3(e) of the Act which defines 'employee' as any individual employed by an employer, and Section 3(g) which defines 'employ' to mean 'to suffer or permit to work.' Since the appellee suffers or permits drivers to work for its salesmen, *ipso facto* they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

(3) *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8th, 1942):

It was contended that one Marvin Johnson was an employee of the Ferry Company because he performed the service for the Ferry Company of hauling loads of coal each day to the landing stage; also that he repaired part of the road leading to the ferry and kept it in such condition as to enable passengers and freight to reach the ferry landing on one side of the river; also, he occasionally hauled a load of brick to be used for the same purpose. He was not paid by the Ferry Company for this work, but was employed and paid by the week by the General Manager of the Ferry Company who operated a cotton plantation near the river. The Court in the opinion by Circuit Judge Riddick, said:

"* * * The Act defines an employee as 'any individual employed by an employer,' and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted can not be interpreted to include as an employee one over whose hours of labor the

employer has no control, and to whom the employer is under no obligation to pay wages."

The court quoted *Bowman* v. *Pace Company, supra,* with approval (l. c. 620).

(4) *Reconstruction Finance Corp.* v. *Merryfield,* 134 F. 2d 988 (C. C. A. 1st, 1943).

A judgment against the RFC for overtime compensation to alleged employees was reversed. The question involved was whether the Shoe Corporation or the RFC were in control of the premises where appellees were employed as watchmen, firemen and maintenance men. Various facts were shown which were claimed to indicate that RFC employed appellees. Among other facts the checks for their wages were signed by RFC. However, Circuit Judge Mahoney in his opinion said that:

> "The testimony * * * is clear that in the matter of hiring and discharging employees, directing them in their work and fixing their wages, the Shoe Corporation, through its officers, was in complete control and did not consult with nor receive advice from RFC. * * *
>
> "* * * In *Bowman* v. *Pace Co.*, 5 Cir., 1941, 119 F. 2d 858, 860, the question was raised whether the corporation whose premises were watched by a night watchman suffered or permitted him to work for it. The court determined 'if one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.'"

(5) *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6th, 1943).

In this case the Court held that certain home workers receiving substandard compensation for their work were

employees within the meaning of the Fair Labor Standards Act. It was contended that there was no supervisory control over home workers but it was conceded that their services were engaged by defendant and the compensation paid directly to the workers without any intervening contractor. In the opinion by Circuit Judge Simons, the decisions of *Bowman v. Pace, supra*, and *Walling* v. *Sanders, supra*, are quoted and approved. The Court says:

> "Much has been written concerning the meaning of subsection (g). It was said by the court of the Fifth Circuit in *Bowman* v. *Pace Company*, 119 F. 2d 858, 860, so greatly relied upon by the appellee: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.' This statement of principle is, however, illuminated by the illustration which immediately follows: 'If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.' There would seem to follow from this negation, an affirmation that if one does suffer or permit another to work under circumstances where an obligation to pay him will be implied, they are employer and employee under the Act. The problem in the Pace case was not to determine whether a master-servant relationship existed at all, but whether it existed between the employer and the industry sought to be regulated as an employer. If such relationship existed between the employee and an intermediate independent contractor, the defendant was not accountable for violation of law."

The foregoing decisions have been followed in numerous cases by the district courts, of which we cite the following: *Maddox* v. *Jones*, 42 F. Supp. 35 (D. C., Ala., 1941); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128

(D. C., Calif., 1942); *Dugas* v. *Nashua Mfg. Co.*, 62 F. Supp. 846 (D. C., N. H., 1945) and *David* v. *Boylan's Private Police*, 34 F. Supp. 555 (D. C., La., 1940).

The opinion of the Court of Appeals in this case does not point out in what manner the purposes of the Act would be served by the decision. It lays down no principle or rule by which liability could be determined. It follows no definite pattern, and if it is to be approved it will introduce uncertainty of interpretation that will be utterly impractical in the administration of the Act.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued, directed to the said United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court for its determination, a full and complete transcript of the record and proceedings in the cause numbered and entitled on the docket of said Circuit Court of Appeals as No. 3213, *L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor,* v. *Rutherford Food Corporation and the George Kaiser Packing Company*, to the end that the decision of such District Court may be reviewed and determined by this Court and the decree thereof be reversed by this Honorable Court.

E. R. MORRISON,
HOMER H. BERGER,
Attorneys for Petitioners.

MORRISON, NUGENT, BERGER, HECKER & BUCK,
Of Counsel.

APPENDIX

Pertinent Sections of the Fair Labor Standards Act of 1938

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

Finding and Declaration of Policy

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free

flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Definitions

Sec. 3. As used in this Act—

* * * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * * * *

Maximum Hours

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * * *

Prohibited Acts

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such pro-

ceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

Penalties

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly

situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Injunction Proceedings

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

* * * * * * * *

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 562.

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS,

VS.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

THE OPINIONS BELOW.

The opinion in the District Court (R. 144-157) is not as yet officially reported. The opinion of the Tenth Circuit Court of Appeals (R. 167-177) is reported at 156 F. 2d 513.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 18, 1946 (R. 177). A petition for rehearing was denied August 26, 1946 (R. 188). The petition for certiorari was filed October 2, 1946, and the order allowing certiorari granted November 12, 1946 (R. 189). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347(a).

STATUTE INVOLVED.

The case involves the construction of Sections 3(d), 3(e), 3(g) and 7(a) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*).

QUESTIONS PRESENTED.

1. Whether it is the purpose of the Fair Labor Standards Act (a) to create a liability for the payment of wages to persons as to whom no wage liability would otherwise exist or (b) to measure the extent of an existing wage liability which has been created by agreement, express or implied?

2. Does the phrase "suffer or permit to work" as used in the Act bring within its scope persons with whom there is no contractual obligation to pay wages either express or implied?

3. Do the purposes of the Act bring employees of an independent contractor into an employer-employee relationship with a plant operator because the contract requires the work to be performed in the plant, in intimate association with the plant operator's employees, and as a

contribution to the common object of production, there being no intent to evade the Act?

STATEMENT.

This is a suit praying for an injunction against petitioners for claimed violations of the Fair Labor Standards Act. The complaint concerns the operations of a small packing plant or slaughter house situated in Kansas City, Kansas, during a period beginning in October, 1942, and continuing to the time of the trial of the suit in January, 1945.

The Kaiser Company is and has been for many years the owner of the plant and operated it during the time in question except for a period of ten months when it was leased to the Rutherford Company, which took over the Kaiser organization and the meat boning contracts, and continued the operations in the same manner as they had been conducted by Kaiser (R. 12, 13, pars. 6, 7). This lease had been cancelled before this suit was instituted (R. 12, par. 6; 3).

The Rutherford Company had large government contracts for canned meat. To secure itself an adequate supply of boned beef for the purpose of filling these contracts, Rutherford bought a controlling interest in the Kaiser Company in March, 1943, a few months after Kaiser began to produce boned beef, and assisted in financing the operations of Kaiser (R. 11, 12, par. 5).

In order to enable the Kaiser Company to qualify for government subsidies that were put into effect in November, 1943, and which required complete separation of slaughtering and processing operations the Rutherford Company sold its stock in the Kaiser Company to Paul Kaiser and ceased its financing of that company in the summer and fall of 1944 (R. 13-15, pars. 10-13). At the

time of trial, Rutherford's only relationship with the Kaiser Company was that of being its principal customer (R. 95, par. 14; 137).

For the purpose of this proceeding, however, the issues are treated as being identical as to both petitioners during their respective periods of operation. For convenience, "Kaiser" will sometimes be used herein as referring to the "plant operator" and as including the Rutherford Company during the period that it operated the plant.

Kaiser first determined to begin the boning of beef for canning purposes in October, 1942. Prior to that time he had one man working in the cooler who devoted part of his time to boning better cuts of beef for city trade. This was the only kind of boning that Kaiser had done theretofore (R. 16, pars. 17; 89).*

Boners were scarce and in great demand by the packers (R. 99). Normally boning of this type is seasonal and the boners go from city to city following the heavy cattle runs (R. 110).

Kaiser made inquiries as to obtaining boners which came to the attention of an experienced boner named Jim Reed who had been working with another boner named Peterson (R. 16, par. 18).

Reed advised Kaiser that he had previously worked in two St. Louis packing plants where beef was boned by independent contractors who employed the boners and performed the work at a certain price per hundredweight. Reed proposed to make a contract with the Kaiser Company on the same basis. Kaiser accepted the proposition

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*This a different type of boning from quantity boning of beef from inferior grades of cattle known as "cutters and canners." See Beef, Lamb and Veal operations, Fourth Edition (1945), published by the Institute of Meat Packing, University of Chicago (pp. 124, 125). This book was cited by both respondent and petitioners in their briefs in the Court of Appeals. These boning operations require skill (ib. p. 130).

and a written contract was drawn, dated October 14, 1942. Peterson joined in this contract (R. 16, pars. 18-19; R. 32, Ex. 1; R, 90-92).

Contracts of this character were not uncommon in Kansas City and elsewhere (R. 162, par. 22); Reed had worked for years under such arrangements (R. 90) and at the time Reed left the Kaiser plant he made an arrangement with the Kornblum Packing Company comparable to that which he had had with the Kaiser Company, which arrangement was carried on by him and his successors at that plant (R. 21, par. 34).

Reed operated under his contract until February, 1943, when he was succeeded by Schindel, an experienced boner, who took over the work under the terms of the Reed contract until May, 1944, when Hooper and Deere took over under the same arrangement. Deere dropped out in October, 1944, and Hooper held the contract at the time of trial (R. 16, 17, pars. 20, 21).

The terms of the contract between Kaiser and Reed were substantially as follows (Ex. 1, pp. 32-35):

> Kaiser agreed to furnish Reed all carcasses of beef for government boning (amended to include boning for government contractors, R. 35); Reed agreed to complete boning of all carcasses furnished him each day but not in excess of 20,000 pounds (later increased to 40,000 pounds, R. 36, par. 2, Ex. 2) of boneless meat, including waste; the work was to be performed in the vestibule of the Kaiser plant; Kaiser was to deliver the carcasses on the rail and to pick up the boned meat, tenderloins, bones and waste after they had been sorted by Reed in barrels; Kaiser was to furnish and wash all barrels; the work was to be performed in compliance with government specifications and regulations and under approval and directions of government inspectors; Reed was to do the work as an independent contractor and to employ, compensate and

be responsible for all of his employees; Reed's employees were to be under his sole direction and control and not subject to direction or control of Kaiser; Kaiser was not to have the right to supervise or direct the work of Reed or any of his employees; Reed was to furnish all his own tools and equipment except the vestibule and the boning tables; Reed agreed to carry Workmen's Compensation and Employers' Liability insurance on his employees and protect and indemnify Kaiser from injuries to persons and property caused by him or his employees; Reed and his employees were not to interfere with ingress and egress of Kaiser and its employees to the plant through the vestibule; the contract rate for the work was 40¢ per hundred pounds (later raised to 45¢ in January, 1944, R. 21, par. 35) for boneless beef, including the weight of tenderloins but excluding weight of kidney knobs, bones, waste and fat; boneless beef and tenderloins were to be weighed by Kaiser and a record kept of all weights and daily copy furnished to Reed; settlement was to be made on a weekly basis; all employees of Reed were to be affiliated with the CIO; neither party was to be liable to the other for failures occasioned by breakdowns, strikes, acts of God or other unavoidable contingencies; the agreement was to commence October 15, 1942, and to continue for the duration of hostilities subject to termination on two weeks notice.

Reed and Peterson employed about four boners to work with them (R. 16, par. 20). Schindel's group consisted of three to eight boners and averaged about six (R. 16, par. 20). Hooper and Deere hired three or four boners from May, 1944, to October, 1944, and thereafter the group consisted of from five to seven boners (R. 21, par. 35). The contractors did their "hiring and firing" at 1717 West Ninth Street, where the boners made their headquarters (R. 101, 109).

The boners were employed exclusively by Reed and his successors. Kaiser had nothing to do with engaging

the services, fixing wages and hours, determining the work to be done or controlling the activities of the boners. The following agreed facts are embodied in the stipulation (R. 22, 23, 24):

"37. The plant operator has never exercised any direction or control over any sharing or division of the boning money and has no direct knowledge of how the division is and has been made or determined, or of what boners have been hourly paid or their rate of pay.

"38. At no time has the plant operator kept any records with reference to the boners, except that the plant operator has kept complete and accurate records of the weight of beef boned and a complete and accurate record of the weekly sums paid for said boning as aforesaid on the aggregate weight of the boned beef on a hundredweight basis.

"39. At no time has the plant operator, through Paul O. Kaiser or any other company official, exercised direction or control over who shall work as boners or engaged the services of any boner or made any arrangements, contract, or agreement with respect to compensation with any boner, except in the instances of the arrangements with Reed, Peterson, Schindel, Deere and Hooper, as aforesaid, and except in the instance of one Dolinar, whose employment by Reed as a boner was directed by The Kaiser Co. (see Exhibit 1 attached hereto, paragraph 12). The plant operator has not directed the boners to start their work at any set time, to leave at any set time or fixed their luncheon or other rest periods. They have determined their own hours of work, though in general their hours of work on a given day would correspond to the hours other work in the plant was in progress. They have boned on days when there was no 'kill' and cattle have been killed on days on which they did not bone. Such plant operator employees as the barrel washer; laborers handling the barrels, etc., of course work about the same hours as the boners."

The CIO had contracts at the plant, which provided for a closed shop and check-off system but the boners were not included under the plant contracts, although they were members of the same local; the plant operator did not collect their dues nor were they represented or controlled by the steward of the union at the plant; the plant operator did not include them in its Workmen's Compensation policy and did not make any deductions from the checks payable to the contractors for unemployment compensation taxes or withholding taxes (R. 23, par. 40).

Payment on a hundredweight basis for the beef boned was made by weekly check of the plant operator to the contractors, first to Jim Reed until February, 1943, then to Schindel, until May, 1944, and thereafter to Hooper (R. 21, par. 35).

Sharing was the predominant method by which the boners were compensated by the contractors. During the period that the boning contract was held by Reed, and also when held by Schindel, there was an equal division of the boning money among all of the boners, except one or two part-time or inexperienced boners who were paid by the hour at the rate of $1.25 or $1.50 per hour (R. 21, par. 35). During the period from May, 1944, until October, 1944, the money paid to Hooper was divided equally between Hooper and Deere, after paying three or four boners they hired from time to time, at the rate of $1.35 to $1.50 per hour, except that toward the end they "cut in a couple of other boners on the split." After November, 1944, the money paid to Hooper was divided equally among the five to seven boners doing the boning, including Hooper (R. 21, par. 35). The contractors worked with the boners and received the same share of the boning money when it was divided on a sharing basis (R. 22, par. 35).

Reed and Schindel did not pay overtime to the few part time and inexperienced boners they employed by the hour, but Hooper, after he became the contractor, paid overtime to all hourly paid men employed by him (R. 22, par. 36).

A competent group of boners would average 350 to 400 pounds of boned meat per man per hour (R. 22, par. 35), which on the basis of 40¢ per hundredweight would equal $1.40 to $1.60 per hour and on the basis of 45¢ per hundredweight would equal $1.57½ to $1.80 per hour.

The boners were satisfied with the plan (R. 59). The government inspection which resulted in this suit, did not originate from any complaint from the boners or from employees of the plant operator but was caused by complaints from competitors of Kaiser (R. 31, par. 63).

The work of boning was performed in a room called the "vestibule" which immediately adjoined the cooler (see plat, Ex. 3, R. 40 A). The overhead rail, used for moving the dressed carcasses from the cooler to the loading dock, ran along one side of this room. When carcasses were to be boned they were brought out of the cooler on the main rail and delivered to the boners on a "detour rail" at the entrance to the vestibule (R. 18, 19, par. 27). After being delivered to the boners the carcasses were never touched or handled by any employee of Kaiser (R. 19, par. 27; R. 73), and when the boning was completed the meat was thrown by the boners into barrels or to the trimmer who removed small pieces of fat, cartilage, etc.; the barrels were removed by Kaiser's employees (R. 20, par. 30). Any carcasses not to be boned, moved directly through the boning vestibule for delivery (R. 19, par. 27).

The trial judge made findings covering the foregoing facts (R. 157-163). He also found that the contracts with Reed and his successors were not sham or deceptive arrangements but were necessitated by the exigencies of

the situation confronting the Kaiser Company in October, 1942 (R. 162, par. 19); that the plan under which boners shared equally in the boning money was commonly employed in Kansas City and elsewhere and that most of the boners who worked in the Kaiser plant worked at various times in various plants under independent contractors (R. 162, par. 21); that there was nothing inequitable in the sharing method, which gave each man an interest in the work being done by the other members of the group and also gave no advantage to the men who were boning the fleshier parts of the carcasses; under this plan beginners and casual boners could be equitably taken care of by payment on an hourly basis (R. 162, par. 21).

Opinion in the District Court.

The trial court held that there was nothing in the boning contract that was contrary to the purposes of the Act, and that in fact it would be difficult to conceive of a method of doing business that would do more to promote the principles of the Act (R, 152). It was held that the boning was done by independent contractors and that the relation of employer and employee did not exist between the Kaiser Company and the boners. The court cited with approval *Bowman* v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5, 1941).

Opinion of the Court of Appeals.

In the majority opinion of the Court of Appeals it was held that the boners were employees of Kaiser because the work was being done on his premises, alongside admitted employees and contributed to the common objective of plant production. The opinion likened the operation to the conventional factory assembly-line. The majority opinion gave no consideration to the fact that there was no contractual relationship existing between Kaiser and the

boners, and ignored the decision in *Bowman* v. *Pace Company* and the numerous cases which follow it. Judge Phillips filed a separate opinion, concurring in the result in so far as it granted an injunction as to certain conceded employees, but he was of the opinion that the findings and conclusions by the trial court as to the status of the boners should be accepted (R. 173), and he dissented from the order denying the motion for rehearing (R. 188).

ARGUMENT.

I.

Kaiser Had No Control As to Employment or Discharge of Boners and He Had No Contractual Relationship with Them, Either Express or Implied; They Were Employed, Paid, Directed and Controlled Solely by the Contractors.

Kaiser did not, and could not, suffer or permit any boner to work upon the premises. The contract provided that the boners should be employed and compensated by Reed and that they should be under his sole direction and control (R. 33, par. 7). Kaiser agreed that he should not have the right to supervise or direct the work of Reed or any of his employees (*ib.*).

In fact, as the parties stipulated, the plant operator never engaged the services of any boner or made any arrangement or contract with respect to the compensation of any boner nor did the plant operator ever exercise direction or control over who should work as boners (R. 23, par. 39).

It is further stipulated that the plant operator has not directed the boners as to the time to start or stop their work, but that the boners have determined their own hours of work (R. 23, par. 39); that the plant operator has not exercised any "direction or control over any sharing or division of the boning money and has no direct knowledge of how the division is and has been made or determined, or of what boners have been hourly paid or their rate of pay" (R. 22, par. 37). The exact division of the different steps of the boning process was determined by the boners themselves (R. 19, par. 28).

The trial court made findings of fact fully covering all of the matters stated above and these findings were not challenged in the Court of Appeals nor is there any suggestion in the majority opinion contrary thereto.

The Circuit Court of Appeals arrives at the conclusion that the employer-employee status existed between the plant operator and the boners on the basis of a few facts which are stated in the opinion and from none of which an agreement for compensation could be implied. None of these facts indicate that any purpose of the Act was being violated.

The fact that the work of the boners may have been preceded and followed by work of employees of the plant operator certainly is not related to any evil which the Act was intended to remedy. As a matter of fact, the work of Kaiser's employees was ended when the carcasses were delivered to the boners. The carcasses were in the exclusive possession of the boners after they were delivered on the "detour rail" (R. 19, 73). When the boning was completed nothing remained but for the employees of Kaiser to take away the barrels containing the boned meat and deliver it to the processor, in this case generally to Rutherford.

Certainly no significance attaches to the fact that the work of the boners was performed after the carcasses had been dressed, cooled and were ready for boning or for delivery as dressed beef if not to be boned.

Whether or not the facts create some resemblance to the conventional factory assembly-line can make no possible difference in the determination of the case. As a matter of fact, the resemblance is more fancied than real, but there is nothing in the Act which would prevent any manufacturer from engaging an independent contractor to perform any particular operation in connection with work performed in an assembly-line.

The work of boning constituted a separated and well defined process. The beef reached the boners in the form of a half carcass: it was delivered to them hanging head down from the "detour rail" and was never touched thereafter by any Kaiser employee until the boning was finished. It was boned and separated into (1) boned meat ready for the canner, and (2) bones, fat, waste, etc., to be sold to other processors (R. 19, par. 27).

Kaiser's complaints as to the failure of the boners to remove all the meat from the bones was a matter relating to results only and not to methods, and did not constitute control of details. Such complaints as to results have always been held to be consistent with the independent contractor relationship. *Ryan-Richards, Inc.*, v. *Whitesides*, 96 F. 2d 826 (C. C. A. 10th, 1938); *Chicago, Rock Island & Pacific Railway Company* v. *Bond*, 240 U. S. 449; *Singer Manufacturing Company* v. *Rahn*, 132 U. S. 518; *Casement* v. *Brown*, 148 U. S. 615.

The Court of Appeals does not say that any of these matters have any bearing upon the purposes of the Act, nor the evils to be remedied. Neither does it suggest any reason for holding that either singly or in their "composite effect" they would warrant the court in striking down a valid contract and substituting in lieu thereof a "relationship" not supported by any contract, express or implied.

The only conclusion that can be drawn from the opinion is that the Court of Appeals treated the phrase "suffer or permit to work" as including all persons working on the premises, including employees of an independent contractor, merely because their work contributed ultimately to plant production.

To the contrary, the very recent decision of this court in the case of *Walling* v. *Portland Terminal Company* (No.

336, decided February 17, 1947), 67 Sup. Ct. Rep. 639 (not officially reported), establishes the law to be that the phrase "suffer or permit to work" has no meaning of such all-inclusive scope. In that case the court said in the opinion by Mr. Justice Black:

> "Section 3(g) of the Act defines 'employ' as including 'to suffer or permit to work' and Section 3(e) defines 'employee' as 'any individual employed by an employer.' The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit" (Emphasis supplied).

In working for the contractors, the boxers were serving their own "personal purpose." It was their choice of occupation and their choice of employer. There was no violation of the purpose of the Act which, as stated by this Court, is "to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage."

The facts conceded by respondent in his "Memorandum for Respondent" heretofore filed in this Court would seem to bring this case clearly within this Court's holding in the *Portland Terminal case, supra.* Respondent says (p. 8):

> "* * * in the instant case petitioners were under no contract obligation to pay wages to the boners 'employed' by the 'independent contractor' boners, and petitioners had no contractual right to hire or fire such employees, * * *"

This concession is in accord with the stipulated fact that there was no promise of compensation by Kaiser to any individual boner and there certainly could be no expectation or hope on the part of the boners that they would be paid by the plant operator in the face of the fact that they were hired by the contractor, paid by the contractor and received from him compensation which was adequate for the work done. The testimony shows that they were satisfied (R. 59) and the trial court found as a fact that the amounts received were "far in excess of the minimum prescribed by the Act" and raised no inference of "any intent to impose hardships or substandard working conditions on the boners" (R. 162, par. 20). Boners were scarce and they were in an excellent bargaining position; they chose their own employer at a time when many employers and many plans of work were available (R. 99, 21) and they evidently got what they wanted.

Reed and his successors were bound by the provisions of the Fair Labor Standards Act. The boners to be employed by him would necessarily be engaged in the production of goods for commerce and entitled to the protection of the Act to the same extent as they would have been if employed by Kaiser. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (10 C. C. A., certiorari den., 318 U. S. 774). If some of them chose to become partners or joint adventurers with Reed and his successors, that was no matter of Kaiser's choosing and it was placed entirely beyond his control by the express provisions of the contract.

The sharing method was an arrangement between the boners themselves. There is nothing in the contract to control Reed or his successors in regard to the mode or amount of compensation or other arrangements that they might make with the boners employed by them. The contract does not provide for the sharing method and it is evident that this plan was adopted by the boners because they considered it to be equitable and practicable for their own purposes. The plant operator had no direct knowledge as to how the division was made or determined. This is stipulated (R. 22, par. 37).

It has long been the policy of the Federal Government to encourage cooperative effort in every legitimate form. That attitude was well expressed by Mr. Justice Brandeis in *Liggett Co.* v. *Lee*, 288 U. S. 517, 579, where he said in the course of his dissenting opinion:

> "* * * But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation."

This language was quoted with evident approval by the Court of Appeals in the First Circuit in the case of *Fleming* v. *Palmer*, 123 F. 2d 749, 761, certiorari denied, 316 U. S. 662. While the principle was held to be inapplicable there because a true cooperative was not involved, it is applicable to the sharing arrangement in the case at bar.

II.

The Trial Court Found That the Contracts Were Made in Good Faith, and the Finding Was Not Challenged on Appeal and Was Fully Supported by the Evidence.

The complaint contained no allegation of any purpose to evade the Act, but the question was raised in the trial court and was ruled against the Administrator both in the trial court's opinion (R. 148, 149) and in the findings of fact (R. 162, pars. 19, 20, 21, 22). Respondent did not challenge these findings when taking his appeal (R. 1) and there is no suggestion in the opinion of the Court of Appeals that there was any purpose to evade the Act. The findings of fact on this point are as follows:

> "19. The contracts with Reed and his successors were not merely sham and deceptive arrangements, but were necessitated by the exigencies of the situation confronting the Kaiser Company in October, 1942.
>
> "20. The contracts with Reed and his successors raise no inference of any intent to impose hardships or substandard working conditions on the boners. Individual boners received amounts far in excess of the minimum prescribed by the Act and their hours were not inconsistent with those provided in the Act.
>
> "21. The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be

equitably taken care of by payment on an hourly basis out of the boning money. There is nothing in the contract to prevent the contractor or the group from paying overtime to the boners who work on an hourly basis, which plan was practiced by Hooper since he took over in May, 1944, and which was in effect at the date on which this suit was filed.

"22. It has not been uncommon in the packing industry to use independent contractors as a method of obtaining quantity production of boned beef."

In addition to the findings of fact the trial court made the following observation in the opinion (R. 149):

"It is apparent from this record that boning is rather a special art and only within the past few years has this work been done by packing plants or slaughterhouses generally. It is a specialty not open to the ordinary laborer without training and experience. It is not unreasonable that the Kaiser Company, when it undertook to fill these government contracts, was anxious to acquire this highly skilled labor so as to meet the government requirements. It therefore entered into this contract with Reed and his successors to do this work on a poundage basis."

Notwithstanding the fact that the question of attempted evasion is not present in the case, respondent's "Memorandum" indicates that respondent will ask this Court to apply the ruling held applicable to an entirely different set of circumstances in the case of *Fleming* v. *Palmer, supra*. The Palmer case was cited by the Court of Appeals in its opinion (R. 171, 172), but without any indication of its supposed applicability. There is nothing in common between the two cases. In the Palmer case the alleged employer initiated the organization of a Cooperative Association at the suggestion of a lawyer, for the express purpose of evading the provisions of the Act

with respect to minimum wages and maximum hours. The opinion describes with great detail the steps taken by which the defendant Palmer was enabled to control the Cooperative, so that it was merely an agent of the defendant through which compensation was paid to the workers on a scale determined by defendant. The purpose of the defendant and his lawyer and the means by which it was accomplished were shown by indisputable documentary evidence. The scheme was a palpable evasion of the Act and intended to prevent its standards from being enforced.

The following quotations from the opinion by Circuit Judge Mahoney show the nature of the Palmer scheme. Among other things the court said (l. c. 759):

> "* * * He (Palmer) wrote to his New York agent that the cooperative was being formed 'naturally on the basis of dealing only and exclusively with me.' Thus he spoke as a man who had the power of life and death over the cooperative and could dictate terms to it.
>
> "Nor can there be any doubt that he has such power. He holds the workers in a state of economic subservience because they have been told that their livelihood is dependent on the continued existence of the cooperative, and they know that he can deal it the death blow at any time by rescinding the contracts and proceeding to the liquidation of the large debt owing him. He need not have fears of independent action on the part of membe because he can disenfranchise any member or any number of members at any time. The right to vote is gone if Palmer suspends the worker for failure to display the 'cooperativist spirit' or, indeed, if he merely says that the worker is 'subject to a disciplinary procedure not yet decided.'
>
> "It should be noted that the Puerto Rican workers for the most part are poverty stricken and

possess little bargaining power. * * * Many of them are also illiterate."

In addition to the above considerations, the court quotes a letter written by Palmer in which he tells how he was reorganizing the work shop of one of the employers in the industry into a cooperative. In this letter he said, among other things (l. c. 752):

> " 'On the same day, and in accordance with Castillo, I gave instructions to friend Soltero to proceed immediately to the organization of the Caribbean Embroidery Cooperative, a thing which has been agreed upon by Castillo and me to see whether, in this manner, we do not have to stop our work for even a single day.' "

Cases such as this which show a purpose to evade the law are clearly distinguishable from the case at bar. We do not challenge the principle laid down in *Fleming* v. *Palmer, supra*—indeed the decisions on which we rely recognize the fact that colorable, fraudulent and sham contracts cannot be used as a screen between an employer and workers whose wages, hours and working conditions are actually controlled by him. But the stipulated facts in this case show that no evasion was contemplated or attempted.

III.

There Can Be No Liability under the Fair Labor Standards Act Unless the Claimant Has Performed Work for the Alleged Employer under a Promise of Compensation or under Circumstances from Which Compensation May Be Implied.

The principle for which relator contends is fully in accord with the recent case of *Walling* v. *Portland Terminal Company, supra*. In that case there was an agree-

ment with respect to a training period for applicants for brakemen's jobs, under which it was agreed that the trainees should receive no compensation (except that, for the war period, there was a retroactive allowance if they were later accepted). It appears to have been conceded that the railroads derived an indirect advantage from the fact that a labor pool was built up from which the railroads could later draw employees trained for its service. But it was found that the railroads received no "immediate advantage" from the work done by the employees.

The opinion clearly excludes from the scope of the Act those who ", without any express or implied compensation agreement, might work for their own advantages on the premises of another." In the instant case the personal advantage of the boners was derived from their employment by the contractors (Reed and his successors). This work was done "without promise or expectation of compensation" from the plant operator. On the other hand, it was done under an express promise of payment of compensation by the contractor. Not only was this the express understanding and agreement between the parties, but it was the course of action pursued over a period which extended for more than two years before the time of trial.

Kaiser received an ultimate benefit from the fact that the contracts of Reed and his successors were performed, but this benefit was neither immediate nor direct. Neither was it a benefit which raised any implied promise or expectation on the part of the boners that they would be paid by Kaiser instead of the contractors.

There was no uncertainty in the contracts between Kaiser and the contractors. Reed contracted in writing to employ competent boners and be responsible for and compensate the boners employed by him, who were to be under his sole direction and control (R. 33, par. 7). Schindel, who took over the boning February 12, 1943, did so "under

an oral agreement to continue under the terms of the Reed contract" (R. 16, par. 20); in May, 1944, Hooper and Deere took over "upon the same basis"; and after Deere left in October, 1944, Hooper made a written contract on similar terms (R. 17, par. 20; 35, Ex. 2). All of these facts were stipulated.

Kaiser did not employ any boners. It is stipulated that Kaiser has never "engaged the services of any boner or made any arrangements, contract or agreement with respect to compensation with any boner" except as contained in his contracts with Reed and his successors (R. 23, par. 39); Kaiser has not controlled their hours of work, or the time that they shall start or stop work or when they shall eat their lunch or take their rest periods; the boners "have determined their own hours of work" (R. 23, par. 39). "The exact division of the [redacted] steps of the boning among the boners is determined by themselves" (R. 19, par. 28). Payment for the meat boned has always been made direct to the contractors and not to the boners (R. 21, par. 35); the plant operator "has never exercised any direction or control over any sharing or division of the boning money" and he has no direct knowledge of how the division is made or "what boners have been hourly paid or their rate of pay" (R. 22, par. 37).

In the "Memorandum for Respondent" filed in response to the Petition for Certiorari, it is conceded (p. 8) that the petitioners were under no contract obligation to pay wages to the boners "employed" by the independent contractor, and petitioners had no contractual right to hire or fire such employees.

In the majority opinion of the Tenth Circuit Court of Appeals there is no suggestion of any contractual relationship between the plant operator and the individual boners, either express or implied. The decision can only be construed as holding that without any obligation to

pay wages, either express or implied, and without even an "expectation" of payment of wages, the plant operator can be held liable simply because the work is performed on the premises and indirectly contributes toward the purpose of plant production.

This holding we believe to be contrary to the decision of this court in the *Portland Terminal Company case, supra*, and it is unquestionably contrary to opinions rendered in a number of cases decided by various courts of appeals and district courts.

In *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 137 (1944), this Court, referring to the Fair Labor Standards Act, said in the opinion by Mr. Justice Jackson:

> "* * * The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

This principle has been applied to the Act in a number of cases where the facts are analogous to those presented in the case at bar.

Bowman v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5th, 1941), was the earliest Court of Appeals decision on this question. The defendant, a wholesale grocery company, contracted with one Forsyth, to furnish a watchman at its plant. For a time Forsyth employed the same watchman who had previously been employed by defendant. Subsequently Bowman, the plaintiff, was employed by Forsyth to do the watchman's work at the Pace Company plant. In addition to his duties as watchman, plaintiff delivered and received from truck drivers employed by defendant bills covering goods carried by them, delivered pay envelopes, took charge of money brought in by drivers, and arranged for lubrication of trucks. Bowman was subject to defendant's orders and his work was performed on the

same premises, in intimate association with employees of the defendant, and toward the common purpose of the company's operations. The court held Bowman was not an employee of the Pace Company within the meaning of the Act. The court said in the opinion by Sibley, C. J.:

> "The strongly contested issue is whether he was the employee of the Pace Company at all. If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. If the Pace Company, in order to evade the Act, colluded with Forsyth to interpose him as an apparent independent contractor, we would hold him the agent of the Pace Company to hire and pay the watchman, so that Bowman would be the employee of the Pace Company. While that is alleged here, the proof wholly fails to sustain it, * * *
>
> * * * * * * *
>
> "But it is argued that Bowman was so far under the orders of the Pace Company as that Forsyth was not an independent contractor, * * * If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed., Secs. 665, 680" (Emphasis supplied).

In *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8th, 1942), one Marvin Johnson hauled coal daily for the use of the Ferry Company; he also repaired parts of the road leading to the ferry and occasionally hauled

brick for that purpose. He was not employed or paid by the Ferry Company but was employed by the general manager of that company who operated a cotton plantation nearby. In the District Court, Johnson was held to be an employee under the definitions contained in the Act, but the Court of Appeals reversed the case and in the opinion by Circuit Judge Riddick, said:

> "* * * The Act defines an employee as 'any individual employed by an employer,' and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted cannot be interpreted to include as an employee one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages. *Bowman* v. *Pace Company*, 5 Cir., 119 F. 2d 858" (Emphasis supplied).

Walling v. *Sanders*, 136 F. 2d 78 (C. C. A. 6th, 1943), is in point both as to the facts and law. The defendant in that case was a wholesale beer dealer and its salesmen drove the defendant's delivery trucks, delivered beer and picked up empty cases. The salesmen employed and paid drivers to assist them in their duties. These drivers were doing, in part at least, the identical work that the salesmen were hired to perform and worked on trucks belonging to the company alongside the drivers and to a common purpose. The Administrator brought suit against the dealer to compel him to pay overtime to the drivers. The Court said in the opinion by Simons, C. J.:

> "The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.' But the administrator urges that the term 'employee' as here used is not a word of art but one carefully defined by the statute. He refers to Section 3(e) of the

Act which defines 'employee' as any individual employed by an employer, and Section 3(g) which defines 'employ' to mean 'to suffer or permit to work.' Since the appellee suffers or permits drivers to work for its salesmen, *ipso facto* they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

Reconstruction Finance Corp. v. *Merryfield*, 134 F. 2d 988 (C. C. A. 1st, 1943), involved the same principle from a slightly different aspect as to the facts. The F. M. Hoyt Shoe Corporation had borrowed money, on the security of its plant, from the Reconstruction Finance Corporation to whom it had later assigned all its rents, but the Shoe Corporation had retained control of the plant, discharging, directing and fixing wages of employees. Wage payments, however, were made by check of the RFC. The Court quoted and applied the rule stated in *Bowman* v. *Pace*, *supra*, and said in the opinion by Mahoney, C. J.:

"The testimony * * * is clear that in the matter of hiring and discharging employees, directing them in their work and fixing their wages, the Shoe Corporation, through its officers, was in complete control and did not consult with nor receive advice from RFC. * * *"

Walling v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6th, 1943), is cited by the Tenth Circuit Court of Appeals in support of its opinion. To the contrary we rely upon it as (a) quoting and following the *Bowman* and *Sanders cases* (the latter having been decided by the same court) and (b) pointing out the distinction between a case

where there was a direct contractual relation between the alleged employer and employee and a case where there was an intervening third party. That case involved the status of homeworkers under the Fair Labor Standards Act. The homeworkers were compensated on a substandard basis, measured by the provisions of the Act. It is said in the opinion by Simons, C. J. (l. c. 63):

> "* * * The problem in the Pace case was not to determine whether a master-servant relationship existed at all, but whether it existed between the employee and the industry sought to be regulated as an employer. If such relationship existed between the employee and an intermediate independent contractor, the defendant was not accountable for violation of law. The same was true in our case of *Walling* v. *Sanders*, 6 Cir., 136 F. 2d 78, 81, where we said 'in so broadly defining the word "employ" Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment,' and pointed out that to so construe it as to include not only those who work for an accused employer but also those who work for anybody else, such construction would 'encompass all employed humanity.' * * *" (Emphasis supplied).

In *Walling* v. *Twyeffort, Inc.*, (C. C. A. 2, Jan. 16, 1947) 158 F. 2d 944, the defendant was engaged in the business of custom tailoring; the material was cut on defendant's premises and sent to a number of outside tailors, some of whom employed errand boys, sweepers and pressers and paid their wages; the manner in which the work was performed was such that the court held there was no valid distinction between the tailors and homeworkers as to their employee-employer status. However, one tailor, Goldberg, employed fourteen tailors and although it does not appear that there was any agreement between him and defendant in the nature of a contract which would estab-

lish his status, it was held that he was an independent contractor. The court said in the opinion by Frank, C. J.:

> "We do think that Goldberg, who employs some fourteen other tailors in his shop, does not come within the scope of the injunction, which relates only to 'employees.' Whether or not he personally performs any of the actual tailoring work is not decisive, for it seems to us that a man who employs fourteen men to do the work that he has contracted to do cannot reasonably be classified as anything but an independent contractor. * * *"

In *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (D. C. Cal., 1942) (reversed on other grounds 137 F. 2d 742; cert. denied, 320 U. S. 770), janitors were furnished banks by third party contractors. The work was done on the premises and some control was exercised (l. c. 135). The work of the janitors, as the court held (l. c. 138) was "indispensable to the banks," which "could not properly carry on their business without janitorial service." It was held that the banks had no contractual relationship with the janitors and were not liable to them but the contractors, as the immediate employers, were held liable.

Maddox v. *Jones*, 42 F. Supp. 35, 42 (D. C. Ala. 1941), is likewise in point. It was said in the opinion by McDuffie, D. J.:

> "* * * It is a matter of common knowledge that thousands of industries contract for services or material to be furnished by or through independent contractors thousands of miles away, or even on the premises of the plant or industry which receives the ultimate benefit of the labor performed by the employees of the contractor. Those industries, in a sense, 'suffer or permit' such employees to work, but not within the sense or meaning of 'suffer or permit'

as used in the Fair Labor Standards Act" (Emphasis supplied).

Also in point are *Dugas* v. *Nashua Mfg. Co.*, 62 F. Supp. 846 (D. C. N. H., 1945, appeal dismissed, 154 F. 2d 655); *David* v. *Boylan's Private Police*, 34 F. Supp. 555 (D. C. La., 1940); *Schroepfer* v. *A. S. Abell Co.*, 48 F. Supp. 88 (D. C. Md., 1942, affirmed on other grounds 138 F. 2d 111, cert. denied, 321 U. S. 763).

The method of sharing the boning money, which was the predominant method employed, was fair and equitable and the trial court so found (R. 162, par. 21). A similar method was approved in *Walling* v. *Plymouth Manufacturing Co.*, 139 F. 2d 178 (C. C. A. 7, 1943) certiorari denied, 322 U. S. 741. The Plymouth company had not made any profit for several years and was afraid it could not meet the standards of the Fair Labor Standards Act. Accordingly, the plant was leased to four of the officers of the company who organized a partnership in which all the workers joined on the basis of a division of the net profits by means of certain drawing accounts and distribution of the remaining profits to the partners. The opinion was written by Circuit Judge Minton who assisted in formulating the Act as a member of the Senate. The court said (l. c. 181):

> "The four lessees, or tenants in common of the leasehold, after the subletting of the property to the Plymouth Manufacturing Company joined with the workers in what they termed a partnership agreement. The four lessees in the so-called partnership agreement were at first known as the senior partners. The workers in the plant generally were termed junior partners. The workers and the senior partners performed very much the same tasks and services for the Plymouth Manufacturing Company as they had performed for the Plymouth Manufacturing

Corporation. The management of the Company's affairs was in the hands of the senior partners, who could take in new partners or let out old ones. The junior partners were to receive a drawing account based upon their contributions in labor or services, which were to be evaluated by the senior partners. Each junior partner's drawing account was determined by multiplying his hours of work by a sum per hour, which hourly rate was fixed by the senior partners."

* * * * * * *

"* * * a distribution of the profits earned in a partnership or co-operative effort gives rise to legal rights among the partners (l. c. 182).

* * * * * * *

"Whether or not there was a partnership created here by these parties is a question of their intentions" (l. c. 182).

In the District Court, Judge Slick wrote the opinion and he held that the plan "was not only legal but laudable." *Walling* v. *Plymouth Manufacturing Corporation*, 46 F. Supp. 433.

IV.

Cases Involving a Direct Contractual Relationship Are Not in Point.

In the Memorandum which respondent filed in response to petitioner's petition for certiorari, reference is made to the cases of *Fleming* v. *Palmer*, *supra*, *Walling* v. *Needlecrafts, Inc.*, *supra*, and *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4, 1942), as being cases which respondent evidently deems to support the ruling of the Circuit Court of Appeals. Counsel also refers to the case of *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 129.

Walling v. *American Needlecrafts, Inc., supra,* is a case where the defendant was in direct contractual relationship with the home-workers who were engaged in various types of needlework. In the following quotation from the *American Needlecrafts case* (139 F. 2d, l. c. 63), the court quotes from *Bowman* v. *Pace, supra,* and comments on the quotation as follows:

> "Much has been written concerning the meaning of subsection (g). It was said by the court of the Fifth Circuit in *Bowman* v. *Pace Company,* 119 F. 2d 858, 860, so greatly relied upon by the appellee: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.' This statement of principle is, however, illuminated by the illustration which immediately follows. 'If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.' There would seem to follow from this negation, an affirmation that if one does suffer or permit another to work under circumstances where an obligation to pay him will be implied, they are employer and employee under the Act. * * *".

This language shows that a case involving a direct contractual relation falls in one category and a case involving no direct contractual relation falls in an entirely different category. In the *American Needlecrafts* case the defendant did have an obligation to pay the workers and the court therefore had a right to measure and interpret the obligation and to determine whether compliance with the Fair Labor Standards Act was shown. Absent such obligation the provisions of the Act do not apply.

Southern Railway Company v. *Black, supra,* is another case where there was a direct contract for the rendering

of service between the parties alleged to stand in the employer-employee relationship. This case involved services rendered by porters or "red caps" who were hired by the defendants and permitted to render services which were held to be "absolutely necessary to the proper operation of a railway station." The men, it was said, were subject to "the general supervision and control of defendants in rendering these services and that the defendants have the power to discharge them." The court said in the opinion by Circuit Judge Parker (l. c. 282):

> "* * * And we are not impressed with the argument that the companies can escape with payment of minimum wages to them simply by providing that they shall look for compensation to tips from persons whom they assist."

In *National Labor Relations Board* v. *Hearst Publications, supra,* there was a direct contractual relationship existing between the newspapers and the newsboys through district managers. The boys, or men, were stationed at particular spots and compensation was controlled by means of fixing the difference between the prices at which the papers were sold by the newsboys and the prices they paid for them. It was also said that "substantial control of the newsboys' 'take home' can be effected through the ability to designate their sales areas and the power to determine the number of papers allocated to each." Other facts are stated in the opinion from all of which this Court concluded that the newsboys were in fact employees.

It is obvious that in this Court's opinion in the *Hearst* case there was no attempt to create any contract or obligation but merely to interpret the obligation which arose from the contractual relationship between the parties and to determine the real nature of that relationship from the standpoint of economic reality.

That decision is not authority for creating wage obligations between parties who have no contractual relationship with each other.

IN CONCLUSION.

It is, we believe, clear that the boners were not employees of Kaiser or Rutherford under any possible interpretation of the facts or the law.

Respectfully submitted,

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APPENDIX

Pertinent Sections of the Fair Labor Standards Act of 1938

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

* * * * * * * *

Finding and Declaration of Policy

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free

flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as praticable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Definitions

Sec. 3. As used in this Act—

* * * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * * * *

Maximum Hours

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * * *

Prohibited Acts

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused

to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

Penalties

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent

jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Injunction Proceedings

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

* * * * * * * * *

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OCT 24 1946

No. 562

In the Supreme Court of the United States

OCTOBER TERM, 1946

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 562

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 150–163) is not officially reported. The opinion of the Circuit Court of Appeals (R. 175–185) is reported at 156 F. 2d 513.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 18, 1946 (R. 185–186). A petition for rehearing was denied August 26, 1946

(R. 203). The petition for certiorari was filed October 2, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether all boners working in an assembly-line production process in petitioners' slaughterhouse are employees of petitioners within the meaning of the Fair Labor Standards Act, notwithstanding contracts which characterize certain of the boners as "independent contractors" and others as employees of the "independent contractors."

STATUTE INVOLVED

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

Petitioners operated a slaughterhouse in which they produced large quantities of boned meat[1] (R. 11–12, 16). The boning operations were performed in a room at the plant, known as the boning vestibule, by workers called "boners" (R. 168). The carcasses to be boned were moved by an overhead rail system through a series of processes by petitioners' employees into the boning vestibule (R. 178). The carcasses were

[1] Each of the petitioners operated the same plant at different times (R. 164). The issues are the same as to both petitioners.

checked, cleaned, and weighed by petitioners' employees in the boning vestibule before being switched onto the boners' detour rail (R. 178). The meat was then removed from the bones by the boners and, as removed, thrown to a trimmer, an employee of petitioners, or into barrels (R. 178). As the barrels were filled they were removed from the boning vestibule by petitioners' employees (R. 178).

The boners were not hired in the same manner as the other workers in the plant who admittedly were employees of petitioners (R. 21). Petitioners entered into contracts (R. 32–39) with one or two boners which provided that they, as "independent contractors," would do the boning at the plant for a specified sum per hundred pounds of boneless beef. The contract contemplated that the "independent contractor" boners would hire, supervise, and pay other boners who would be their employees and not petitioners' (R. 177). The compensation paid by petitioners for boning operations was ordinarily divided equally among all the boners (R. 167).

The district court held that "the relation of employer and employee did not exist between the defendants [petitioners] and the beef boners" (R. 169) and dismissed the Administrator's complaint (R. 171). The Circuit Court of Appeals for the Tenth Circuit reversed, holding that the employment relation should be determined "by

reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other" and that a consideration of the "underlying economic realities * * * lead[s] to the conclusion that the boners were and are employees" of petitioners (R. 180, 181).

DISCUSSION

We believe the decision of the court below correctly applies the provisions of the Fair Labor Standards Act and should be affirmed in the event of review by this Court. Nevertheless, we do not oppose the granting of a writ of certiorari because of the desirability of obtaining an authoritative determination of the scope of the employment relation under the Act.[2]

Determination of who is an "employer" or "employee" under federal regulatory legislation does not depend upon abstract conceptual considerations. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 129, establishes that the applicability of these terms is determined by the "underlying economic facts rather than technically and exclusively by pre-

[2] The scope of the employment relation under Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended, is pending before this Court in *United States of America* v. *Albert Silk*, No. 312, certiorari granted October 21, 1946.

viously established legal classifications.[3] However, the approach taken in the *Hearst* decision has not been uniformly followed by the lower courts in dealing with the numerous "employment" cases constantly arising under the Fair Labor Standards Act.[4]

---

[3] Additional support for a liberal interpretation of the scope of employment under the Fair Labor Standards Act is to be found in the broad definition of "employ" in Section 3 (g), not contained in the National Labor Relations Act, as including "to suffer or permit to work."

[4] The decisions construing the concept of employment under the Act have been legion. They have applied varied criteria and reached divergent results. *Reconstruction Finance Corp. v. Merryfield*, 134 F. 2d 988 (C. C. A. 1); *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. 2d 278 (C. C. A. 2), affirmed on other grounds, 316 U. S. 517; *Greenberg* v. *Arsenal Bldg. Corp.*, 50 F. Supp. 700 (S. D. N. Y.), affirmed, 144 F. 2d 292 (C. C. A. 2), reversed on other grounds, 324 U. S. 697; *Looney* v. *Albert H. Wetten & Co.*, 7 Wage Hour Rept. 36 (N. D. Ill., 1943); *Mungovan* v. *Manierre*, 6 Wage Hour Rept. 638 (N. D. Ill., 1943); *Keyer* v. *Hope Estates, Inc.*, 53 F. Supp. 1004 (S. D. N. Y.); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.); *Brennan* v. *Community Service Society*, 6 Wage Hour Rept. 696 (N. Y. C. Ct., 1943); *Barrow* v. *Adams & Co.*, 6 Wage Hour Rept. 1264 (Munic. Ct. N. Y., 1943); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. C. A. 8); *Woods* v. *Wilkerson*, 40 F. Supp. 131 (W. D. La.); *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y., 1943); *Cottrell* v. *Wetterau Grocer Co.*, 4 Wage Hour Rept. 482 (E. D. Mo., 1941); *Brown* v. *Minngas Co.*, 51 F. Supp. 363 (D. Minn.); *Schroepfer* v. *A. S. Abell Co.*, 48 F. Supp. (D. Md.), affirmed on other grounds, 138 F. 2d 111 (C. C. A. 4), certiorari denied, 321 U. S. 763; *Walling* v. *Southwestern Greyhound Lines, Inc.*, 65 F. Supp. 52 (W. D. Mo.); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Bush* v. *Wilson & Co.*, [illegible] Kan. 80, 138 P. 2d 457; *Mosier* v. *Retail*

The circuit courts of appeals have usually recognized "economic realities" to find the existence of an employment relation under the Act, whatever the label used in the contract between the parties, where there is a direct contract between the "employer" and the "employee." *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662 (members of cooperative); *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6) (independent contractors); *Southern Ry. Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4) (licensees). But cf. *Walling* v. *Plymouth Mfg. Co.*, 139 F. 2d 178 (C. C. A. 7), certiorari denied, 322 U. S. 741 (co-partners). The holding of the court below that the boilers with whom petitioners made their contracts are employees of petitioners, despite the contracts' characterization of them as "independent contractors," is therefore in accord with the weight of authority.

Credit Co., 5 Wage Hour Rept. 336 (D. Kans., 1942); *Passman* v. *Retail Credit Co.*, 5 Wage Hour Rept. 401 (D. Kans., 1942); *Molina* v. *Rodriguez*, 5 Wage Hour Rept. 259 (D. P. R., 1942); *Van Hee* v. *Breuer*, 8 Wage Hour Rept. 1084 (N. D. Ohio. 1945); *Whatley* v. *Great Southern Trucking Co.*, 123 F. 2d 143 (C. C. A. 5); *Wilson* v. *Shuman*, 140 F. 2d 644 (C. C. A. 8); *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 (C. C. A. 5); *Walling* v. *Norfolk Southern Ry. Co.*, 6 Wage Hour Cases 252 (E. D. N. C., 1946); *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), reversed on other grounds, 133 F. 2d 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Walling* v. *Wolff*, 63 F. Supp. 605 (E. D. N. Y.); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.); *Nelson* v. *Kuepper Favor Co.*, 4 Wage Hour Rept. 699 (N. D. Ill., 1941); *Walling* v. *Sieving*, 9 Wage Hour

Where an intermediate person is designated as the "employer," however, the circuit courts of appeals have shown greater reluctance to penetrate contract forms and in some cases have engrafted limitations of a technical character upon the statutory definition of "employ" as including "to suffer or permit to work." *Bowman* v. *Pace Co.*, 119 F. 2d 858 (C. C. A. 5); *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8). The *Bowman* and *Helena Glendale* cases adopt the view that an employment relationship exists within the meaning of the Act only if there is an express or implied obligation to pay wages

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Rept. 356 (N. D. Ill., 1946); *Walling* v. *Todd*, 52 F. Supp. 62 (M. D. Pa.); *Gross* v. *Grissom*, 5 Wage Hour Rept. 498 (N. D. Miss., 1942); *Domenech* v. *Cities Delivery Express*, 5 Wage Hour Rept. 562 (D. P. R., 1942); *Automobile Banking Corp.* v. *Willison*, 181 Md. 118, 28 A. 2d 864; *Soto* v. *La Plata Sugar Co.*, 6 Wage Hour Rept. 943 (D. P. R., 1943); *Walling* v. *Merchants Police Service, Inc.*, 59 F. Supp. 873 (W. D. Ky.); *Dugas* v. *Nashua Mfg. Co.*, 62 F. Supp. 846 (D. N. H.); *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La.); *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W. D. Va.); *Holmes* v. *Industrial Cotton Mills Co., Inc.*, 64 F. Supp. 20 (W. D. S. C.); *Creekmore* v. *Public Belt R. R. Comm.*, 5 Wage Hour Rept. 653 (E. D. La., 1942), affirmed, 134 F. 2d 576 (C. C. A. 5), certiorari denied, 320 U. S. 742; *Matlock* v. *Sanderson & Porter*, 6 Wage Hour Rept. 917 (Ark. Cir Ct., 1943); *Dennis* v. *Equitable Equipment Co.*, 7 So. 2d 397 (La. Ct. App., 1942); *Mitchell* v. *Shefford Cheese Co.*, 9 Wage Hour Rept. 321 (M. D. Tenn., 1946); *Collier* v. *Rural Educational Assn.*, 7 Wage Hour Rept. 151 (Tenn. Ch. Ct., 1943).

apart from the statute.[5] The *Sanders* case makes the existence of the relationship depend upon the right to hire and fire. Since in the instant case petitioners were under no contract obligation to pay wages to the boners "employed" by the "independent contractor" boners, and petitioners had no contractual right to hire or fire such employees, the holding of the court below is inconsistent with the theories of the above decisions. In view of the different approaches of the circuit courts of appeals and the district courts, the importance of an authoritative clarification of the proper tests of the employment relationship under the Fair Labor Standards Act seems clear. Accordingly, we do not oppose the granting of a writ of certiorari.

Respectfully submitted.

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OCTOBER 1946.

[5] *Walling* v. *The Nashville, Chattanooga & St. Louis Ry.* and *Walling* v. *Portland Terminal Co.*, Nos. 335 and 336, certiorari granted October 14, 1946, present a narrow phase of this problem.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 et seq:

SEC. 3. As used in this Act—

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 11.

* * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

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No. 562

In the Supreme Court of the United States

OCTOBER TERM, 1946

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 562

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS

v.

WILLIAM R. McCOMB,* ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR

OPINIONS BELOW

The opinion of the District Court (R. 144–157) and its findings of fact and conclusions of law (R. 157–163) are not reported. The opinions of the Circuit Court of Appeals for the Tenth Circuit (R. 167–177), reversing the judgment of the District Court, are reported at 156 F. 2d 513.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 18, 1946 (R. 177). The

*The Acting Solicitor General is filing a motion to substitute as respondent the Honorable William R. McComb, successor to the Honorable L. Metcalfe Walling, as Administrator of the Wage and Hour Division, U. S. Department of Labor.

petition for a writ of certiorari was filed on October 2, 1946, and granted November 12, 1946 (R. 189). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain persons working as boners in petitioners' slaughterhouse are employees of petitioners within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 3 (d), 3 (e), 3 (g), 7 (a)-(3) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, which are set forth in the Appendix, pp. 57–58.

STATEMENT

The facts of this case have been largely stipulated and are not in dispute (R. 10–31). While petitioners' brief adequately summarizes the contractual arrangements with the boners, we think that a more complete statement of the actual operation of the contracts and of the boners' functions in relation to the operation of petitioners' plant is required for a determination of the issues presented.

Petitioners, operating a slaughterhouse in Kansas City, Kansas, employ approximately 30 to 32 employees in the production of boned meat

(R. 11–13, 16, 17, 18, 20, 30), in addition to the 5 to 8 persons working as boners whose status is involved here (R. 16–17, 30).[1] The slaughterhouse operations are carried on in a manner similar to methods used in a highly integrated assembly-line production (R. 18, 19, 20, 169–170). The cattle are slaughtered, skinned and dressed in the killing room (R. 18, 19). The carcasses are then moved by means of an overhead rail system through a series of processes performed by admitted employees of petitioners (R. 18–19, 20–21, 170), first to the hot cooler for overnight cooling, then to the main cooler the following morning (R. 18, 68–69, 169), and then into the boning vestibule (R. 18, 169). Admitted employees of petitioners also work in the boning vestibule while the carcasses are still on the main rail, removing pieces of hide, fat or dirt, weighing the carcasses and switching them to the boners' detour rail (R. 19, 73, 170). The boning vestibule contains two long tables, one small table, barrels, and the overhead rails (R. 18, 19, 170). The boners work along the two long tables (R. 18). The small table is used by a trimmer, who is admittedly an employee (R. 20–21).

When the carcasses move into the boning vestibule, they are completely dressed and have been

[1] As stated in the petition for certiorari, each of petitioners operated the plant at different times and the issues are the same as to both petitioners (Pet., p. 3).

split down the backbone (R. 19). The boners quarter the carcass and perform the boning by holding the meat with a hook and removing the meat from the bones with a knife. As the meat is removed from the bones, it is thrown by the boners directly into barrels or handed to the trimmer, who uses a hook and knife to remove the remaining small pieces of meat from fat and cartilage. The trimmed meat is thrown into the barrels containing the boned meat (R. 19, 20, 170). As the barrels are filled, they are removed from the boning vestibule to the dock, weighed, and put on trucks by petitioners' admitted employees (R. 20, 170). The barrels are washed in a separate room and brought into the boning vestibule also by petitioners' employees (R. 20, 170). The entire operation from the killing to the placing of the boned beef upon the dock for loading on trucks "normally takes 48 hours, or slightly more" (R. 18) and is an integrated continuous process (R. 172).

The tables, barrels and rails in the boning vestibule are owned by petitioners (R. 20, 170). The boners, as well as the trimmer, furnish their own leather belts, hooks, and knives (R. 20, 170), but the aprons worn by all of them are furnished and laundered by petitioners (R. 20, 170).

Prior to October 1942, the Kaiser plant did very little boning and it was done by an hourly paid employee employed as a combined butcher,

beef boner, and order filler (R. 16). In the summer and fall of 1942, petitioners undertook to furnish a great amount of beef boned to Army specifications (R. 16), and therefore required more boners. Instead of hiring the boners in the same manner as the other workers in the plant, petitioners entered into contracts with one or two boners which provided that they, as "independent contractors", would perform the boning in the boning vestibule of petitioners' plant for a specified sum per hundred pounds of boneless beef (R. 32–39). Under the terms of the original contract entered into in October 1942, Kaiser agreed to furnish the carcasses for boning and supply such equipment as tables and barrels (R. 32). The contract provided that the "contractor" was to "employ, compensate and be responsible for all of his employees," to supervise and control such employees, to carry workmen's compensation and employers' liability insurance covering them, and that any boners hired by him should be affiliated with the industrial union in the plant (R. 33–35).[2] Settlements for amounts due the "contractor" were to be made up and paid on a weekly basis (R. 34). The contract was to continue in effect "for the duration of hostilities"

[2] In fact, all the boners, including the contractors, were required by the union to become union members, although the union contract with respect to job classifications, wage scales and working conditions does not cover the boners (R. 23, 170).

but could be terminated by either party upon two weeks' notice (R. 34–35).

This contract actually remained in effect for approximately four months when the first two contractors who had signed the agreement quit work without notice (R. 16–17, 160, 169). After they abandoned the work, one of the boners from the group became the "independent contractor" by orally assuming the terms of the original contract (R. 17, 160, 169). He carried out the contract for approximately fifteen months when he also quit without notice and was replaced by two other boners from the group who carried on the work until November 1944 (R. 17, 160, 169). On October 28, 1944, petitioners entered into a written contract with one Hooper which contained substantially the same terms as the original written agreement (R. 35–39). Unlike the original agreement, however, the Hooper contract did not designate an "independent contractor" but purported to let "the Boning Room, together with the rails, tables and other fixtures now therein" to Hooper who signed the contract as "The Frank Hooper Boning Company, by Frank Hooper" (R. 35–36, 39). The contract rate was increased five cents per hundred pounds of boned beef, and a clause was added providing a rental of $100 a month to be paid for the "lease" of the boning vestibule. However, no rental has ever been paid (R. 20, 160, 169). Hooper stated that although he signed the contract at the office of Kaiser's

lawyer, he did not know who drew it and that he had nothing to do with the language used in it (R. 56, 58). He never received a copy of the contract and did not even know whether the petitioners or any representatives of theirs had ever signed it (R. 58).

The contract provided that petitioners should not have the right to supervise or control the work done by the "contractor" or his employees (R. 33, 37). However, the contract provided not only that the boning should be performed on petitioners' premises but that it be done "in full compliance with all applicable Government Specifications and Regulations" and "in accordance with the approval and directions of all Government inspectors" (R. 33, par. 6).[1] In addition, the contract provided in detail just what parts should be removed from the carcasses, what meat cuts should be made, and how the parts and cuts should be sorted (R. 32–33, pars. 3, 4, and 5 of the contract).[2] Although there has been no strict

[1] Paragraph 6 of the contract reads as follows: "6. All of the said work to be performed by Reed shall be performed in full compliance with all applicable Government Specifications and Regulations, from time to time applying to the work to be performed by him or to the said items or to any sales agreement or sales order with the U. S. Government, and all of said work shall be under and in accordance with the approval and directions of all Government inspectors."

[2] "3. The boning of said carcasses, which Reed agrees to perform shall cover, in addition to actual boning, the stripping of serous membranes from flanks, skirts and naval

supervision of hours worked by the boners (R. 61, 170), the hours are in fact determined by the number of cattle slaughtered and the hours worked by the Government inspector (R. 23, 61, 170). Since a Government inspector must be present when the boning operations are performed, work is centralized in one room (R. 78) and continued as long as the inspector is on duty (R. 61). Also, Kaiser, who manages the plant and is personally in charge of its operation (R. 66), is in and out of the boning vestibule all of the time. He is "all over the plant so many times a day, I couldn't tell you how many times I do go around" and "probably go through there [the boning vestibule] a dozen times a day" (R. 79). He is "continuously" after the boners to get

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ends, including the removal or stripping of leaders, glands, skins, kidney knobs, large veins, blood stains and clots, and the removal of required fat, and shall also cover the cutting of said carcasses into boneless chucks, boneless ribs, boneless plates, boneless loins and boneless rounds.

"4. Reed shall perform all work herein provided for as an independent contractor in the vestibule of the Kaiser Packing Plant. Kaiser's shall deliver said carcasses to Reed on the rails in said vestibule, and Kaiser's shall pick up the boned meat, tenderloins, Kidney Knobs, bones, fat products and waste, after the same have been sorted by Reed in barrels as hereinafter provided. Kaiser's shall also furnish and wash all barrels required for the sorting of said items.

"5. Reed shall separately sort and place in separate barrels, so furnished him by Kaiser's, (a) all meat cuts including tenderloins, (b) all bones, (c) all fats and waste, and (d) all kidney knobs."

the bones good and clean (R. 79), and when he has to leave the plant he asks the assistant manager "to kind of watch it for me" (R. 80).

The money received by the "contractor" from petitioners usually has been divided equally among all the boners (R. 22, 160, 169), although petitioners customarily have advanced money throughout the week to the boners (R. 97). Prior to November 1944, however, part-time, occasional or inexperienced boners were paid an hourly rate by the "contractor," but this practice has been discontinued (R. 22, 160). The "contractors," like the other boners, share equally in the boning money, and, like the others, do not receive compensation for days not worked (R. 22, 23, 58–59). When special jobs have to be done, petitioners pay the individual boners an hourly rate (R. 107–108), and all of the boners have been so employed by petitioners part of the time (R. 108).

The District Court held that "the relation of employer and employee did not exist between the defendants [petitioners] and the beef boners" (R. 163), and dismissed the Administrator's complaint (R. 163). The Circuit Court of Appeals for the Tenth Circuit reversed, holding that while the direction and control test "along with others" may be taken into consideration, "it is not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at

common law (R. 172). Therefore, "in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other" (R. 171). The court concluded that "these underlying economic realities * * * lead to the conclusion that the boners were and are employees" of petitioners within the meaning of the Act (R. 172).

SUMMARY OF ARGUMENT

I

All of the boners, including the contractor-boners, are petitioners' employees within the meaning of the Fair Labor Standards Act. Not only is the Act a remedial statute whose purposes require a broad interpretation of the employment relationships within its scope, but the statute "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.*, No. 336, this Term, decided February 17, 1947, slip sheet, p. 3; *United States* v. *Rosenwasser*, 323 U. S. 360. The purposes of this Act require a practical, realistic construction of the employment relationship (cf. *National Labor*

Relations Board v. *Hearst Publications*, 322 U. S. 111), and the broad language of the statutory definitions is more than adequate to support such a construction.

A. The contractor-boners, like the other boners, are ordinary skilled manual laborers within the class of workers clearly intended to be covered by the Act. The basic objective of the Act—to eliminate as rapidly as practicable "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" the existence of which Congress found to be "an unfair method of competition in commerce" (Section 2)—would be defeated if an employee were deprived of its benefits by the simple device of calling him an "independent contractor." The necessity for maintenance of the statutory standards is not affected by the label which is applied, nor is the competitive effect of an article produced by a contractor-boner working under substandard conditions any the less destructive of the statutory standards than an article produced by employee-boners working under substandard conditions. This is not to say that genuine entrepreneurs occupying established places in our industrial structure as independent contractors should be held "employees" within the scope of the Act. But the circumstances of this case show that the boners here involved are workers in the most

fundamental sense. Applying a test based upon practical realities, rather than abstract legalisms, these boners cannot be regarded as independent contractors without doing violence to a common-sense construction of the Act.

The nature of the work of the contractor-boners, the close interrelation of their work with the work of admitted employees in the integrated production process carried on by petitioners, their union membership, their basis of compensation, their lack of independent economic or financial resources, and the actual operation of the contract, are all characteristic of an employment relationship rather than an independent contractor. Nor, upon analysis, do the terms of the contract negate the existence of an employment relationship. The contract provisions purporting to give the contractor-boner independent control over the boning operations and employees are so qualified by other contract provisions, giving detailed instructions of the work expected of the boners and requiring all work to be done pursuant to detailed Government Specifications and Regulations and in the presence of a Government inspector, as to make the control and independence largely theoretical. The power of the contractor-boner to hire other boners and his limited control over the other boners are hardly sufficient, when weighed with the other pertinent facts, to exclude him from the employee class. His independence scarcely exceeds

that of the boners he hired, and his authority to hire, fire, and supervise differs not at all from that of a working foreman or of countless other employees exercising some supervisory duties on behalf of their employees.

The decisions of the circuit courts of appeals under this Act, both before and after this Court's decision in the *Hearst* case, have been virtually unanimous in holding that neither technical, common law concepts nor contract terminology are the exclusive criteria for determining the employment relationships covered by the Act. They have uniformly recognized the applicability to this Act of the realistic, common-sense approach indicated in the *Hearst* decision. Petitioners' attempt to distinguish these decisions on the ground that they involved "colorable, fraudulent and sham contracts" will not bear analysis.

B. If the contractor-boners are petitioners' employees, *a fortiori* the boners hired by the contractor-boners are petitioners' employees. Plainly, the contractor-boners are acting "directly * * * in the interest of" their employer in hiring the other boners. The same reasons which support the conclusion that petitioners are employers of the contractor-boners apply with equal, if not greater, force to the other boners. These boners are admittedly employees within the protection of the Act, and the only question is whether the responsibility for their working stand-

ards rests upon petitioners, the proprietors of the business, or upon the contractor boners. The whole purpose of the legislation is certainly opposed to any such shifting or delegation of responsibility, and the language of the statutory definitions appears to have been chosen deliberately to protect the statutory standards from such circumvention. It would defeat the basic purpose of this Act to allow the responsibility for maintaining minimum labor standards to be delegated to persons who are themselves dependent workers and are not independent contractors "in the only sense in which that phrase is here relevant." *Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547, at 552.

The fact that petitioners may not have assumed a contractual obligation to pay these boners compensation does not mean that they have no statutory obligation for maintenance of the minimum labor standards with respect to them. *Walling* v. *Portland Terminal Co.,* No. 336, this Term, decided February 17, 1947, does not repudiate the long recognized view that an employment relationship can exist even though the employee must look elsewhere than to his employer for his compensation.

II

The district court's findings of fact do not foreclose the ultimate legal issue whether the

boners are petitioners' employees. The majority opinion of the circuit court of appeals does not take issue with the findings of fact but only with the legal conclusions of the district court. Moreover, since all of the evidence was documentary or by way of pre-trial depositions and stipulations, and there was no oral testimony taken before the trial court, the appellate court was in as good a position as the trial court to appraise the evidence and was not conclusively bound by the trial court's findings. Certainly the trial court's "findings" are not conclusive on the ultimate legal issue as to whether the boners were petitioners' employees, since such "findings" were based upon a mistaken construction of the employment relationship under the Act.

III

Even if the boners should not be held to be petitioners' employees, the decision of the court below should be affirmed on the ground that petitioners shipped goods in violation of Section 15 (a) (1) of the Act. Petitioners violated Section 15 (a) (1) by shipping in commerce meat with knowledge that it was produced by employees who worked under substandard conditions, and the injunction order is independently warranted on this ground. It is incontestable that the noncontractor-boners, at least, regardless of who their employers are, are "employees" entitled to the protection of the Act.

ARGUMENT

I

ALL OF THE BONERS ARE "EMPLOYEES" OF PETITIONERS WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

Two groups of boners are involved in this case: (1) the chief boners or "contractors" who entered into contracts with the petitioners; and (2) the other boners hired by the "contractors." Petitioners seem to have assumed, without argument, that the "contractors" are not employees; their brief argues only the questions relating to the status of the other boners. It is the Administrator's contention that both groups of boners are employees of petitioners within the meaning of the Fair Labor Standards Act; that the chief boners, like the other workers in petitioners' plant, are ordinary workers who have only their services to sell, and whose services for petitioners have neither the physical nor economic indicia of independence sufficient to exclude them from the broad statutory definitions of employment in the Act; that the other boners were hired by the "contractors," acting as agents for and directly in the interests of petitioners, to work solely for petitioners; and that, therefore, petitioners cannot avoid responsibility under the Act for the labor standards of both groups of workers.

The process of construction must begin, of course, with the language of the statute. The pertinent provisions of the Act are as follows:

SEC. 3. As used in this Act—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one

and one-half times the regular rate at which he is employed.

As this Court pointed out in a recent decision, the Fair Labor Standards Act "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.*, No. 336, this Term, decided February 17, 1947, slip sheet, p. 3. Consequently, it is clear that "common law employee categories or employer-employee classifications under other statutes are not of controlling significance." *Ibid.*, p. 2. We have here, not only a statute whose remedial purposes require by implication a broad and liberal construction of the employment relationships within its scope (See *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111), but an explicit and deliberate definition which, during its consideration by Congress, was characterized as "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657, 75th Cong., 1st sess.), and of which this Court has said, "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States* v. *Rosenwasser*, 323 U. S. 360, 362. Thus, although the phrase "suffer or permit to work" may not have the all-inclusive scope its literal language might sup-

port (cf. *Walling* v. *Portland Terminal Co.*, No. 336, this Term, decided February 17, 1947), certainly it "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" (see *Hearst* decision, 322 U. S. 111, at 129), and its scope should not be arbitrarily limited so as to exclude employment relationships where "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation" (322 U. S. at 128).

A basic purpose of the Fair Labor Standards Act, as of the National Labor Relations Act, is to redress the inherent inequality of bargaining power between employees and employers—under the National Labor Relations Act by encouraging collective bargaining, under the Fair Labor Standards Act by prescribing minimum fair labor standards. There is no less reason for the application of a broad test of coverage under this Act. And it is equally true of this Act as of the National Labor Relations Act that "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 126.

We do not urge that the literal language of the definitions should be followed to the extent of

holding them applicable to a truly independent contractor. But the definitions in the Fair Labor Standards Act are certainly "easily susceptible" within "the normal meaning of words" (*Addison* v. *Holly Hill*, 322 U. S. 607, 617) to a construction which includes as "employees" those persons whose services in relation to an "employer" are such that, as a practical matter, they would commonly be regarded as his employees. No easy formulation of words is available for use as a criterion in every case. "Considerations of proximity and degree are here, as so often in the law, decisive." *Freeman* v. *Hewit*, No. 3, this Term, decided December 16, 1946, slip opinion, p. 5. The test is, we believe, a realistic one calling for the exercise of a practical judgment mindful of the broad social and economic objectives which Congress sought to attain through enactment of the Fair Labor Standards Act. We urge a test based upon concrete industrial realities, and not upon abstract technical legalisms. This commonsense test, if applied here, leads to the conclusion that all of the boners working in petitioners' slaughterhouse were their employees. In a very real sense, all were "working for" petitioners, and not for themselves. To regard any of them as independent contractors who are "on their own" is inconsistent with a realistic view of the facts; and, for the same reason, it is inconsistent with a sound construction of the Act.

A. THE "CONTRACTOR" BONERS

Petitioners, relying principally upon the absence of any contractual relation with the boners, and upon the fact that they worked "'without promise or expectation of compensation' from the plant operator" (Pet. Br., p. 22), apparently assume, without argument, that the contract sufficed to remove the boners who signed it from the scope of the Act. But it cannot be said of these contractors that they had no "direct contractual relationship" with petitioners, nor can it be said that they worked without promise or expectation of compensation from petitioners (cf. Pet. Br., points III and IV). They are unquestionably employed by petitioners within the literal terms of the statutory definitions. Petitioners "suffer and permit" them "to work" in petitioners' business, to petitioners' immediate advantage and under an express agreement that petitioners shall pay them. Cf. *Walling* v. *Portland Terminal Co., supra,* slip sheet, pp. 4–5. Thus, with respect to these "contractor" boners, petitioners' argument can only be that their agreement to work as "independent contractors," with authority to hire and fire and control other employees, automatically removes them from the scope of the Act.

But this Court's opinion in the *Hearst* case, *supra,* shows that the labels used in a contract of this type ought not to be of controlling significance in determining the application of a statute of this

character. This is not to say that the contract is entitled to no consideration; clearly it is to be considered, along with other relevant factors, in making a realistic determination of the true relationship between the parties. But the contract provisions and characterizations are to be given weight only in the sense that they are relevant to the statutory definitions and objectives. Even apart from the statute, the contract does not establish the nonexistence of an employer-employee relationship. Viewed in relation to the statutory definitions and purposes, the contract signed by a chief boner clearly did not convert him into "an independent contractor in the only sense in which that phrase is here relevant" (see *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, at 552 (C. C. A. 2)).

A basic purpose of the Act was to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (Section 2) by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934;[5] *Phillips Co.* v. *Walling*, 324 U. S. 490, 493. To this end Congress provided that the channels of interstate commerce could not be employed as a means of spreading standards of work destructive of the health and

[5] H. Doc. 255, 75th Cong., 1st sess.

welfare of workers. *United States* v. *Darby*, 312 U. S. 100, 109. Congress fixed its own standards of minimum wages and maximum hours in order to provide a basic guarantee of health and welfare. The necessity of the maintenance of these standards of wages and hours for the health and welfare of workers is not diminished by the fact that the worker is called a contractor rather than an employee. "Where all the conditions of the relation require protection, protection ought to be given." *Lehigh Valley Coal Co.* v. *Yensavage*, *supra*, at 552; *Labor Board* v. *Hearst Publications*, *supra*, at 120. Neither the language nor the purposes of the Act make a distinction between workers who are called employees and workers who are termed "independent contractors." On the contrary, not only is the statutory language "easily susceptible" within "the normal meaning of words" to inclusion of workers such as the chief boners here (Cf. *Addison* v. *Holly Hill*, *supra*, p. 617), but the primary objectives of the Act necessarily comprehend them.

It is significant that the discussions in Congress,[5] the President's Message,[6] and the statement of purposes in Section 2 of the statute are in terms of "workers" rather than "employees," and in

[5] See S. Rep. No. 884, July 6, 1937, 75th Cong., 1st sess.; see also H. Rep. No. 1452, August 6, 1937, 75th Cong., 1st sess.; Statement of the Managers on the Part of the House in H. Rep. No. 2738, June 11, 1938, 75th Cong., 3rd sess., p. 13.

[6] H. Doc. 255, 75th Cong., 1st sess.

terms of excluding from commerce all goods "produced under conditions which do not meet rudimentary standards."[8] The broad objective was to see that "only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce." *Ibid.* As this Court has pointed out, "This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation * * *. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce *the competitive advantage accruing from savings in costs based upon substandard labor conditions*". [Italics supplied.] *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 669–670. Section 2 (a) (3) declares that substandard labor conditions constitute "an unfair method of competition in commerce." The deleterious effects of low labor standards upon competition in interstate commerce provided a primary constitutional basis for Federal legislation in the field. *United States* v. *Darby,* 312 U. S. 100, at 115. Thus, it has been widely recog-

[8] Message of the President of the United States, May 24, 1937, reported in H. Doc. No. 255, p. 3, 75th Cong., 1st sess.; H. Rep. No. 1452, August 6, 1937, 75th Cong., 1st sess., p. 11; H. Rep. No. 2182, April 21, 1938, 75th Cong., 3d sess., p. 7; Statement of the Managers on the Part of the House in H. Rep. No. 2738, June 11, 1938, 75th Cong., 3d sess., p. 13.

nized that an essential requisite to the effective establishment of any basic standards is uniformity of application to prevent persons with lowest standards from underbidding their competitors. The broad definition in Section 3 (g) of the term "employ" appears to have been deliberately directed to this end.

The competitive effect of an article produced by a contractor-worker is no different from that produced by any other worker. Boned beef produced by contractor-boners working under substandard conditions obviously competes in the interstate market with boned beef produced by employee-boners and may be destructive of the work standards of the latter. An employer should not be permitted to obtain "an advantage over competitors in labor costs derived not from efficiency of utilization of labor, but from differences in details of draftsmanship." *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44, 46 (C. C. A. 2). And in this connection it is of some significance that, as petitioners assert in their brief (p. 9), the present action was instituted not because of the complaints of workers but because of the complaints of competitors (Br., p. 9).

If the purposes of the Act are to be effectuated, therefore, the contractor-boners must be deemed within the statutory definition of employment. This is not to say that all independent contractors whose services contribute to the production of

goods for interstate commerce are "employees" under the Act. Undoubtedly there are many genuine entrepreneurs occupying established places in our industrial structure as independent contractors whose recognition as such might do no violence to the statutory objectives. But where the part played in the industrial process is in all essential respects that of the traditional worker, his exclusion from the Act cannot be justified because he is labelled an independent contractor. One who carves meat from carcasses in an assembly line productive process is a worker in the most fundamental sense. This basic fact cannot be altered because a particular employer chooses to shift some additional duties to such a worker and describe these duties as those of an independent contractor.

The background and legislative history of the statutory definitions afford particularly persuasive evidence that Congress did not mean to exclude workers from the scope of this Act because they might be regarded as independent contractors for some purposes under common law concepts. In the original Black-Connery bill, which was not to be applicable to employers employing less than a prescribed number of employees, it was provided that the administrative board should have power to define and determine who were employees of a particular employer, and there was an explicit direction that the definition should be designed

"to prevent the circumvention of the Act or any of its provisions through the use of agents, *independent contractors,* subsidiary or controlled companies, or home or off-premise employees, or by any other means or device."[9] A broad definition of "employee," including "any individual suffered or permitted to work by an employer," subsequently took the place of this provision. See S. 2475, as reported on July 8, 1937, p. 50.[10]

The words "suffer or permit to work" were plainly designed to comprehend all the classes of relationship which previously had been designated specifically as likely means of avoidance of the Act. This language was not new, and was not adopted without knowledge on the part of the legislators of its broad scope. It was taken verbatim from child labor statutes in force in numerous States and from the proposed Uniform Child Labor Law.[11] The language had been inter-

[9] The pertinent portion of Section 6 (a) of S. 2475, 75th Cong., 1st sess., May 24, 1937, read as follows: "The Board shall have power to define by regulation or order the method of computing and determining the number of employees employed by any employer to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device."

[10] In the Act, as enacted, the "suffer and permit" language was incorporated in the definition of "employ" rather than in the definition of "employee."

[11] At the time of the enactment of the Fair Labor Standards Act, the phrase "employed, permitted or suffered to work" was contained in the child labor statutes of thirty-two States

preted by a number of State supreme courts as imposing upon a proprietor a nondelegable responsibility with respect not only to children directly employed by him but also to children whom he suffered or permitted to work in his business. As stated by Judge Cardozo in *People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 29, 121 N. E. 474, 476 (1918), under the terms of such statutes the employer "must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. * * * He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.'" See also *Commonwealth* v. *Hong*, 261 Mass. 226, 158 N. E. 759 (1927), rejecting the defense that the employees employed in violation

and the District of Columbia. The same phraseology appeared in the Uniform Child Labor Laws recommended in 1911 and in 1930 by the National Conference of Commissioners on Uniform State Laws (Child Labor Bulletin, Vol. I, No. 2, August 1912; Proceedings of the National Conference, 1930), in the Standard Child Labor Law recommended in the Child Labor Legislation Handbook compiled by Josephine C. Goldmark (See e. g., issue of 1904, p. 11), and in the Standards Recommended for Child Labor Legislation by the International Association of Governmental Labor Officials. The phrase "employed or permitted to work" was found in seventeen State statutes as well as in the Federal statutes held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20. The statutes are cited in the Appendix to this brief, *infra*, pp. 58–60.

of such a statute were employees of an independent contractor on the ground that the offense was committed when the defendant permitted the children to work in his establishment at the prohibited times.[12]

That Congress, in adopting this language, intended that it should be given broad scope similar to the construction of the State child labor laws is further evidenced by the fact that this same definition in the Fair Labor Standards Act applies to the child labor standards as well as to the wage and hour standards prescribed in the Act. As this Court observed in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 504: "The definitions of this Act apply to the wage and hour provisions, as well as to the child labor provisions." We do not suppose that petitioners would deny that the "contractors" were "employed" within the meaning of Section 12 (a) of the Act if these "contractors" were under-age minors.

Clearly, therefore, the plain language of the statutory definition and its legislative background call for substantial qualifications to petitioners'

[12] See also *Purtell* v. *Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912), holding that the scope of "suffer or permit to work" extends beyond the common law relation of master and servant. To the same effect *Chattanooga Implement & Mfg. Co.* v. *Harland*, 146 Tenn. 85, 239 S. W. 421 (1922); *Curtis & Gartside Co.* v. *Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913); *Graham* v. *Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934).

statement that "there is nothing in the Act which would prevent any manufacturer from engaging an independent contractor to perform any particular operation in connection with work performed in an assembly-line" (Br., p. 13). Were this statement true in the sense that petitioners argue, the Act would soon become a complete nullity. Whatever reasons there might be to limit the application of the statutory definitions with respect to a truly independent entrepreneur, the legislative background and purposes clearly do not warrant excluding from the protection of the Act workers who have none of the indicia of an independent entrepreneur and who are in no better or more independent position than ordinary skilled workers dependent upon the sale of their services for their livelihoods.

Petitioners lean heavily on the contract provisions under which the contractor agrees to hire, be responsible for and compensate the boners and is given "sole direction and control" over them, with express disavowal of any right of control by the plant operator. But, even if it be assumed that the contractor's control in these respects was not qualified by other provisions of the contract and that the character of the operations was such as to afford the contractor unfettered independence of action, nevertheless these indicia of independence are sufficiently counteracted by the fact that the contractor devotes all his normal working time to petitioners' productive operations

and receives all his compensation from these activities. The degree of the contractor-boner's independence scarcely exceeds that of the boners he hires, and differs not at all from that of a working foreman or of countless other employees exercising some supervisory duties on behalf of their employers. Upon analysis, therefore, the terms of the contracts in this case are not inconsistent with a conclusion that the contractors are employees under this Act.

The pattern of the contractor-boners' participation in petitioners' business is characteristic of employment rather than independent operation. They work in petitioners' plant right alongside other boners doing the same sort of skilled or semi-skilled operations (R. 104), and right alongside admitted employees of petitioners (R. 20–21, 170). The work of these admitted employees and the boning are steps in a closely integrated process resembling the conventional factory assembly line with admitted employees performing operations both prior and subsequent to the boning. They were under the continuous, ever-vigilant eye of the plant manager (R. 79–80), as well as "under constant army inspection" (R. 161).

The contractor-boner's supposed right of control over the hours, methods of work and working conditions of the boners is largely theoretical. This right of control is so qualified by the terms of the contract, and is so restricted by requirements

of Government inspection and specifications, as to be virtually nonexistent. The contract provides in utmost detail what parts should be stripped or removed before passing the meat to the trimmer, exactly what meat cuts should be made, and how the pieces should be sorted (R. 32–33, pars. 3, 4, and 5 of Agreement).[13] With such detailed specifications, little, if any, further supervision by an employer was necessary for employees with any experience at the task they are performing. The nature of an employee's work "may be such that much or little supervision may be necessary." *Fischer* v. *Industrial Comm.*, 301 Ill. 621, 629.[14] To allow an employer to escape responsibility under the Act "because the employee exercises the judgment with respect to the work that is expected of

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[13] Paragraphs 3, 4, and 5 of the agreement, quoted in the Statement, *supra*, p. 7, n. 4, indicate how little leeway the contract left for the exercise of independent judgment on how to perform the work.

[14] See also *Peasley* v. *Murphy*, 381 Ill. 187; *Allied Mutuals Liability Insurance Co.* v. *DeJong*, 209 N. Y. App. Div. 505, 507; *Allaby* v. *Industrial Comm.*, 200 Wis. 611, 614; *Industrial Comm.* v. *Bonfils*, 78 Colo. 306 (coal hauler); *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254 (log hauler); *Martin* v. *Republic Steel Co.*, 226 Ala. 209 (pit digger); *Showers* v. *Lund*, 123 Neb. 56 (gravel hauler); *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 141 (lumber hauler); *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298 (log hauler); *Muncie Foundry, etc. Co.* v. *Thompson*, 70 Ind. App. 157 (coke unloader); *Holmes* v. *Railroad Co. et al.*, 49 La. Ann. 1465 (coal unloader); *Murray's Case*, 130 Me. 181 (coal unloader).

any skilled worker, is to lose the substance of the relationship in attempting to apply certain rule of thumb distinctions in the law of independent contractors." See *United States* v. *Vogue*, 145 F. 2d 609, 611 (C. C. A. 4).

In addition, the contract requires the contractor to perform the work "in full compliance with all applicable Government Specifications and Regulations" and "in accordance with the approval and directions of all Government inspectors" (R. 33, par. 6). This requirement not only virtually nullifies any right of control or supervision the contractor supposedly has over methods of performing the work, but also determines the hours of work of the boners. To say that the boners themselves, not Kaiser, control their hours of work (Pet. Br., p. 23, also fdg. 16, R. 161) is meaningless in the face of the fact that working hours are in fact determined by the hours when the Government inspector is at the plant (R. 61, 63). The contractors, along with the other boners and admitted employees of petitioners, work regular hours and as steadily as ordinary employees (R. 23); cf. *Swift & Co.* v. *Alston*, 48 Ga. App. 649; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Kirk* v. *Yarmouth Lime Co.*, 137 Me. 73; *Warner* v. *Fullerton-Powell Hardwood Lumber Co.*, 231 Mich 328; *Showers* v. *Lund*, 123 Neb. 56; *Bradley* v. *Republic Creosoting Co.*, 281 Mich.

177; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254.[15]

Further evidence of the employment status of the contractors is the fact that they, together with their coworkers, are members of the C. I. O. Union which represents all employees working in the plant (R. 23, 104).[16] Employers are normally excluded from union membership. The Packing House Workers Organizing Committee, Local 36 (C. I. O.), to which the contractors here belong, excludes from membership "foreman, superintendents and general managers."[17] The insistence of the C. I. O. steward that the contractor boners be required to join the union indicates that the workers in the plant do not even regard the con-

[15] In any event it has long been recognized that the employment relationship does not depend upon the right of the employer to dictate what particular hours are to be worked. Many persons held to be employees rather than independent contractors are given discretion as to when they will work. See *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6); *Glielmi* v. *Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906, 907; *Burnet* v. *Livezey*, 48 F. 2d 159, 161 (C. C. A. 4); *Park Imp. Co.* v. *Review Board*, 36 N. E. 2d 985 (Ind. 1941); *Aisenberg* v. *C. F. Adams Co.*, 95 Conn. 419, 111 Atl. 591, 592; *Showers* v. *Lund*, 123 Neb. 56; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Warner* v. *Fullerton-Powell Hardwood Lumber Co.*, 231 Mich. 328.

[16] The agreements themselves provided that all boners hired by the "contractor" should be required to join the C. I. O. Union (R. 34, 38). At the insistence of union officials, all "contractors" are also required to join (R. 104).

[17] See Florence Peterson, *Handbook of Labor Unions*, p. 264.

tractors as supervisory employees, much less as independent employers.

The authority to employ, supervise and direct other employees certainly does not of itself exclude the contractor from the status of employee. Many employees as a regular part of their duties interview, and hire employees and supervise and direct their work. Foremen frequently exercise these duties, without losing status as employees. Cf. *Packard Motor Car Co.* v. *National Labor Relations Board*, No. 658, this Term, decided March 10, 1947. That the contractors here acted on behalf of petitioners, rather than as independent employers, is particularly evident from the frequency and ease with which they shifted from "contractor" to employee and vice versa, and the accepted practice on the part of the contractor-boners to quit the job without notice to either petitioners or the other boners. Hooper, for example, had never been in business for himself and had worked at the Kaiser plant admittedly as an employee for almost a year before he signed a written contract as The Frank Hooper Boning Company (R. 16, 17, 35). None of the contractors had any independent business or had ever owned, leased or supplied premises for boning operations (R. 20). They worked as employees before they came to petitioners' plant (R. 16, 90), the first two representing that they

were "unemployed" when they came to Kaiser (R. 90); and some of them returned as employees after terminating contracts (R. 100–101).

Contractor-boners Peterson and Reed, within three months after signing contracts, terminated them without notice by simply failing to report for work (R. 16). Their reputed employees continued to work for petitioners, who selected one of them to succeed as "contractor." This contractor, Schindel, likewise abandoned his function simply by failing to report to work (R. 17). It is significant also that all of the boners whose status is at issue here were regularly hired for short periods each week to bone "City" cattle, as distinguished from Government-inspected cattle, as admitted employees of petitioners at an hourly rate (R. 107–108).

Many courts have indicated that one of the significant distinctions between an employee and an independent contractor is the liability the independent contractor incurs if he terminates the relation before the job is finished. *Industrial Comm.* v. *Hammond*, 77 Colo. 414, 236 Pac. 1006; *Decatur Ry. Co.* v. *Industrial Board*, 276 Ill. 472; *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298; *Muncie Foundry, etc. Co.* v. *Thompson*, 70 Ind. App. 157; *Showers* v. *Lund*, 123 Neb. 56; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Bodwell* v. *Webster*, 98 Neb. 664. The contracts provided for termination upon two

weeks' notice (R. 34–35); the relationship was, therefore, terminable at will.[18]

The method of compensation, also, rather than reflecting the independence of the contractors, reveals their dependence as employees. They are paid weekly on a poundage basis, so that their earnings are directly and solely dependent on the quantity of work performed for petitioners. This method of pay is nothing more than a piece-rate method characteristic of subservience, not independence. Cf. *United States* v. *Rosenwasser*, 323 U. S. 360; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Swift & Co.* v. *Alston*, 48 Ga. App. 649; *Showers* v. *Lund*, 123 Neb. 56; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254, 258. Independent contractors normally risk capital and enjoy an opportunity for profit. Such is not the case here. The fact that the "contract" boner received and had the right to distribute the boning money is not inconsistent with employment, as has been frequently recognized in decisions under this Act (See *Walling* v. *Woodbine Coal Co.*, 64 F. Supp. 82 (E. D. Ky.); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.); *Walling* v. *American*

[18] The importance which has been attached to this factor is discussed at length in the Government's brief in *United States* v. *Silk* (pp. 50–51), this Term, No. 312.

Needlecrafts, Inc., 139 F. 2d 60 (C. C. A. 6), reversing 46 F. Supp. 16; but cf. *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6)),[19] as well as in other decisions dealing with employment relationships. Cf. *Gulf Refining Co.* v. *Brown*, 93 F. 2d 870, 873 (C. C. A. 4); *Hillen* v. *Industrial Accident Comm.*, 199 Calif. 577, 250 Pac. 570; *Sempier* v. *Goemann*, 165 Wis. 103, 161 N. W. 354; *Decatur R. & Light Co.* v. *Industrial Board*, 276 Ill. 472, 114 N. E. 915; *Barg* v. *Bousfield*, 65 Minn. 355, 68 N. W. 45.

[19] In *Walling* v. *Woodbine Coal Co.*, 64 F. Supp. 82 (E. D. Ky.), the defendant coal company entered into written contracts with individuals as "independent contractors" for the mining of coal on its properties. The contract authorized such individuals to hire, discharge and supervise other miners. The company agreed to pay the "contractor" $2.10 per ton for all coal delivered to its tipples. The contractor, free from control or supervision by the company, distributed the money received among the men working with him in accordance with the arrangements between them. The court concluded that under *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, "not only the subordinate personnel but also the alleged independent contractors themselves are employees and within the protection of the provisions of the Fair Labor Standards Act" (p. 85). Similarly, in *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.); and *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.), the defendant companies entered into contracts with purported "independent contractors" to secure workers for the performance of janitorial services and to supervise and direct them in their work. The "contractor" received a fixed monthly sum under the arrangement and divided it among the workers. The court held in both cases that the "contractor" and all the maintenance workers were "employed" by the bus companies within the meaning of the Act.

In short, it would appear that the slight degree of independence exercised by the contractors here is so far outweighed by their economic dependence upon and their close physical connection with petitioners' business as to make them employees even under common law concepts. Clearly they do not have such economic independence or control as to distinguish them from the workers for whose protection this Act was enacted. They are not entrepreneurs engaged in a boning business of their own. They are merely skilled workers, like the other boners and the other employees in petitioners' plant. Petitioners are dependent upon them to perform a necessary and regular step in the day-to-day operation of their business, and they in turn are dependent upon petitioners for their day-to-day livelihood. In these and other respects the contractors here resemble the newsboys held to be "employees" in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. And they are not distinguishable from the homeworkers and other so-called "independent contractors" whom the lower courts have consistently held to be employees within the scope of this Act.

Even before this Court's decision in the *Hearst* case, *supra*, the circuit courts of appeals in cases arising under this Act have usually looked to the "economic realities," rather than to technical common law concepts or to the contract terminol-

ogy, to determine whether an employment relationship existed between the parties to a contract. *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6); *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4); cf. *Walling* v. *Plymouth Mfg. Co.*, 139 F. 2d 178 (C. C. A. 7).[20] And the decisions of the circuit courts of appeals subsequent to the *Hearst* decision have consistently recognized that the same liberal construction of employment relationships there applied to the National Labor Relations Act should be applied to the Fair Labor Standards Act. See, in addition to the decision below, 156 F. 2d 513 (C. C. A. 10), *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944 (C. C. A. 2), pending on petition for certiorari, No. 987; *Hargis* v. *Wabash Railroad Co.*, 6 W. H. Cases 580 (C. C. A. 7).

In the *American Needlecrafts* case, *supra*, despite a contract entered into by homeworkers with respect to each separate assignment calling "for a

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[20] As pointed out in the Government's response to the petition herein, the circuit courts of appeals showed greater reluctance to look behind contract forms where an intermediate person was designated as employer. *Bowman* v. *Pace Co.*, 119 F. 2d 858 (C. C. A. 5); *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8). The decision of the court below in the instant case is the first decision of a circuit court of appeals dealing with such a situation since the *Hearst* case.

completed job according to specification" (46 F. Supp. 16, 22), despite the fact that one worker sometimes distributed and collected the work and distributed the compensation for other workers, despite the absence of any supervision and inspection during the performance of the work and the freedom of the workers to determine their own hours of work, and despite the district court's ruling that the contract was a "valid contract voluntarily and bona fidely entered into" (*id.* at 23), the Sixth Circuit reversed the district court and held that the homeworkers were "employed" by the company, stating:

> It will avail us little to consider whether the master-servant relationship existed between the appellee and its homeworkers under the common law * * *. We are dealing * * * with a specific statute which, like the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., is of a class of regulatory statutes designed to implement a public social, or economic policy through remedies not only unknown to the common law but often in derogation of it * * *. If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable

rules of the common law [139 F. 2d 60, 63].[21]

Similarly in *Fleming* v. *Palmer, supra,* the terminology of the contract between the parties designating workers as members of a producers' cooperative, was disregarded by the First Circuit in favor of the "economic realities" of the arrangement, and the "cooperators" were held to be employees within the statutory definitions and purposes. The Second Circuit in *Walling* v. *Twyeffort, supra,* held outside tailors working for a clothing manufacturer to be employees within the meaning of the Act despite the fact that the tailors, like homeworkers, did not work on the manufacturer's premises, were under no immediate supervision in the performance of the work

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[21] Homeworkers have uniformly been held to be employees under the Act despite agreements designating them independent contractors. See *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), reversed on other grounds, 133 F. 2d 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Walling* v. *Muncie Novelty Co.*, 6 W. H. Cases 557 (S. D. Ind., 1946); *Walling* v. *Hastings*, 6 W. H. Cases 554 (S. D. Ind., 1946); *Walling* v. *Freidlin*, 66 F. Supp. 710 (M. D. Pa.), overruling *Walling* v. *Todd*, 52 F. Supp. 62 (M. D. Pa.); *Walling* v. *Schweitzer*, 6 W. H. Cases 283 (D. C. Puerto Rico, 1946); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.); *Walling* v. *Sieving*, 9 Wage Hour Rept. 356 (N. D. Ill., 1946); *Nelson* v. *Kupper Favor Co.*, 4 Wage Hour Rept. 699 (N. D. Ill., 1941); *Mason* v. *K. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S. D. N. Y.); *Walling* v. *Frank*, 62 F. Supp. 261 (W. D. Ky.); *Walling* v. *Wolff*, 63 F. Supp. 605 (E. D. N. Y.). See also *Walling* v. *Twyeffort, Inc.*, discussed above.

and were free to determine their own hours of work.

In *Southern Railway Co.* v. *Black*, 127 F. 2d 280, the Fourth Circuit held that red caps were employees of the railway company despite a written agreement designating them as "licensees" and despite the provision in the contract that they should look solely to tips from passengers for their compensation. In *Hargis* v. *Wabash Railroad Co., supra*, the Seventh Circuit held that a janitor employed at defendant's railroad terminal was an employee of the railroad regardless of the contract describing him as an "independent contractor." [22]

Petitioners' attempt to distinguish the above

[22] See also *Walling* v. *Sieving*, 9 Wage Hour Rept. 356 (N. D. Ill., 1946) (holding typists who addressed envelopes and labels in their homes for a company operating an addressing service to be "employees" notwithstanding a written contract designating them "independent contractors"); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.) (holding buyer-drivers to be "employees" not independent contractors); *Walling* v. *Woodbine Coal Co.* 64 F. Supp. 82 (E. D. Ky.) (holding coal miners and the miners they engage to work with them to be "employees" notwithstanding written contracts which provided that the miners signing the agreement were independent contractors). To the same effect see *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.) and *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.) (holding that workers, who agreed as "independent contractors" to secure other workers to clean and maintain bus stations and to supervise their work, to be employees notwithstanding the written agreements and the fact that under the arrangement the "contractor" received a fixed weekly sum which he divided among the workers).

cases on the ground that they involved "colorable, fraudulent and sham contracts" (pet. br., pp. 18–21) will not bear analysis. In the *American Needlecrafts* case, *supra,* as already indicated, there was a district court finding, comparable to the finding in the instant case, that the contract had been "bona fidely entered into" (46 F. Supp. at 23), and the opinion of the court of appeals was not predicated upon any different assumption. Likewise there was no hint in *Southern Railway Co.* v. *Black, supra,* that the contractual arrangements were sham contracts or entered into for the purpose of evading the Act. Nor was there any suggestion in the *Twyeffort* case that the contracts were regarded as fraudulent or for the purpose of circumventing the Act. These decisions, like numerous decisions on other aspects of the Fair Labor Standards Act, rest upon the premise that the statutory requirements are "mandatory on the courts regardless of the good faith of the employer." *Rigopoulos* v. *Kervan,* 140 F. 2d 506, 507 (C. C. A. 2). As this Court has stated, "The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank* v. *O'Neil,*

324 U. S. 697. See also *West Coast Hotel Co.* v. *Parrish*; 300 U. S. 379, and cases cited at pages 392–393.[23]

B. THE BONERS HIRED BY THE CONTRACTOR-BONERS

There can be no question that the boners hired by the contractor-boners are employees entitled to the protection of the Act. With respect to them, the only question is whether the responsibility rests upon petitioners, the proprietors of the business in which the boners are employed, or whether these employees must look exclusively to the contractor-boner, who himself is completely dependent upon the proprietors' business for his livelihood and who has no independent finances of resources.

If, as we contend, the contractor-boners are petitioners' employees, they are plainly acting "directly * * * in the interest" of their employer, petitioners, in hiring other boners (Section 3 (d)). It follows that the petitioners are

[23] Thus this Court has held (1) that an employee under the Act cannot contract to receive less than the amount due under the statute. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697; *Schulte Co.* v. *Gangi*, 328 U. S. 108; (2) that "freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 42; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424; (3) that an agreement to accept nothing or an industrial practice or custom to the same effect is of no effect. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602.

also employers of these other boners within the meaning of the Act. The purpose of the statutory definition of "employer" "seems obviously to render employers responsible * * * for acts of any persons performed in their interests." See *Packard Motor Car Co.* v. *National Labor Relations Board*, No. 658, this Term, decided March 10, 1947, slip sheet, p. 3.

The same reasons which require a construction holding petitioners responsible as employers of the contractor-boners, apply with equal, if not greater, force to the other boners. Not only are the words of the statutory definitions comprehensive enough to warrant this construction, but it is obvious that the objectives of the Act will be stifled if factory and plant operators are free to delegate the responsibility to comply with the minimum standards, and employees "are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital." See *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, at 552.

As pointed out, *supra*, pp. 27–29, the language of the statutory definitions appears to have been chosen deliberately to protect the basic labor standards from breaking down through such shifting of responsibility. Congress, it seems not without careful consideration, regarded the need to eliminate oppressive substandard labor conditions on a par with the need to eliminate oppressive child labor. Thus it is unnecessary to "draw

on some unexpressed spirit outside the bounds of the normal meaning of words" (cf. *Addison* v. *Holly Hill, supra,* p. 617) or outside the policy of the statute, to hold a plant proprietor or operator to stricter accountability in these matters than might be warranted where less fundamental policies are at stake.

Petitioners' chief argument is that they have no contractual relation with these boners and in particular no express or implied contractual obligation to pay their compensation. This argument fails completely, of course, if the contractor-boners act "directly or indirectly in the interest" of petitioners in hiring the boners, as we think the record clearly establishes they do. But, in any event, the contractual relations and obligations are not entitled to the controlling significance petitioners would attach to them. It would be wholly illogical to hold that contractual arrangements cannot deprive a worker of the minimum wage and overtime standards of the Act (see cases cited, *supra,* p. 44, n. 23), but that he can waive his status as an employee under the Act by the simple expedient of signing a contract. The fact that petitioners assumed no contractual obligation to pay the boners does not mean they have no statutory obligation for the labor standards of such workers. Petitioners unquestionably employ these boners in the sense that they "suffer or permit" them "to work" in petitioners' business, to petitioners' im-

mediate advantage, and with full expectation of compensation for their services.

Nothing in this Court's opinion in *Walling* v. *Portland Terminal Co., supra,* on which petitioners rely, supports the contention that an employment relationship cannot exist within the meaning of the Act in the absence of a contractual obligation on the part of the alleged employer to pay compensation directly to the alleged employee. Petitioners' reliance on a few phrases from the *Portland* opinion seems to overlook the admonition that "words of [this Court's] opinions are to be read in the light of the facts of the case under discussion" and that "general expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U. S. 126, at 132–133. The *Portland* case was concerned with trainees whose work was of no immediate advantage to the business and indeed actually impeded and retarded it, and who never expected to receive compensation from anyone for their work. That case did not involve the question here presented, whether a person who authorizes the employment of workers to perform services regularly in his business to the immediate advantage of his business and who agrees to pay for such services can avoid responsibility as an employer under the Act by interposing an agent to hire the workers and to distribute the compensation for the services.

It has long been recognized, even under common law concepts, that an employment relation-

ship can exist even though there is no contractual obligation on the part of the employer to pay the employee anything and the employee must look to some third party for compensation. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386; *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); see other cases cited, *supra*, pp. 37–38. As the Circuit Court of Appeals for the Fourth Circuit said in response to a similar argument made in *Southern Railway Co.* v. *Black*, *supra*: "The determinative factor is not the source of their compensation * * *. We are not impressed with the argument that the companies can escape the payment of minimum wages to them [red caps] simply by providing that they shall look for compensation to tips from persons whom they assist." 127 F. 2d 281–282.

It would miss the whole purpose of legislation such as this, as Judge Learned Hand has pointed out in a comparable situation, if employees

> are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital * * *. This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage. * * *. It is absurd to class such a [worker] as an independent contractor in the only sense in which that phrase is here relevant. He has no capital; no financial responsibility. He is himself as dependent upon the con-

ditions of his employment as the company fixes them as are his helpers [*Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. at 552–553].

The record in this case convincingly illustrates the absurdity of permitting such delegation. Petitioners have known well that most of the "contractors" they select are responsible neither as contractors nor as employers. When the first contract was signed by Reed and Peterson, petitioners were advised that one of the "contractors" could not be trusted with the money—he had to be watched "on his drinking" and "to see that the men were paid" (R. 92). When a contractor quit without notice to petitioners or to his "employees," petitioners made no pretense of asserting any claim for unlawful termination of the contract "because we knew the way the men worked, that they made themselves 100 to 130 and 140 dollars a week, and they would always be broke the following Monday morning, so you couldn't come back on people like that" (R. 94). Nevertheless petitioners see no reason why workers in their plant—workers unquestionably entitled to the protection of the Act—should not be obliged to "come back on people like that" to secure the statutory minimum labor standards.

It is no answer to say that the boners voluntarily chose these irresponsible contractors as their employers and had a promise and expectation of compensation only from them. The fact is that the actual selection was petitioners'—peti-

tioners voluntarily chose these men to act as their agents in securing other boners. The literal terms of the statute, we think designedly, are broad enough to afford some degree of protection against such irresponsible delegation. Under the terms and purposes of the statute, whether or not the contractor-boners may be responsible as an employer to the other boners, petitioners would not be relieved of responsibility. The Act seems to have contemplated that under some circumstances several persons might be held to be employers responsible for assuring compliance with the statutory minimum labor standards. The definition of "employer" (Section 3 (d)), including "any person acting directly or indirectly in the interest of an employer" is broad enough and seems designed to insure enforcement of the minimum standards without the necessity of identifying the particular employer who in a strict legal sense might have the ultimate financial responsibility. We contend that, in so far as practicable, the literal language should be construed so as to afford this protection and thereby to accomplish the basic purposes of the Act.

II

THE "FINDINGS OF FACT" BY THE DISTRICT COURT DO NOT FORECLOSE THE ULTIMATE LEGAL ISSUE WHETHER THE BONERS ARE PETITIONERS' EMPLOYEES

The concurring opinion of Judge Phillips expresses the view that under Rule 52 of the Rules

of Civil Procedure the Circuit Court of Appeals was bound by the district court's findings of fact and, therefore, was not free to conclude that the boners are employees of petitioners (R. 173–175). In support of this view his opinion states: "The credibility of witnesses, the weight to be given to their evidence, and the inferences which may be reasonably drawn from the evidence are matters within the province of the trial court" (R. 174). But the opinion of the Circuit Court of Appeals does not indicate that it disregarded the trial court's findings of fact. As we read the majority opinion, the circuit court of appeals merely exercised its undeniable right to review the trial court's judgment as to the legal conclusions to be drawn from the facts found.*

It is fundamental that "the conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based." *Baumgartner* v. *United States*, 322 U. S. 665, 670–671. The evidence in the present case consists entirely of a stipulation (R. 10–31), depositions (R. 46–53,

* *Murray* v. *Noblesville Mining Co.*, 131 F. 2d 470, 474 (C. C. A. 7), certiorari denied, 318 U. S. 775; *Duquesne Club* v. *Bell*, 123 F. 2d 303, 364–365 (C. C. A. 3), certiorari denied, 317 U. S. 638; *Local No. 6167* v. *Jewell Ridge Coal Corp.*, 145 F. 2d 10, 12 (C. C. A. 4), affirmed, 325 U. S. 161; *United States* v. *Armature Rewinding Co.*, 124 F. 2d 589, 591 (C. C. A. 8); *United States* v. *Anderson*, 108 F. 2d 475, 478–479 (C. C. A. 7); *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704, 705–706 (C. C. A. 3).

53–63, 65–143), and miscellaneous documents (R. 32, 35, 40, 41, 44, 45). There was no oral testimony taken before the trial court. Where the evidence is of such a character as here, the appellate court is in as good a position as the trial court to appraise the evidence and draw the ultimate conclusions of law, without being bound conclusively by the latter's "findings of fact". *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. C. A. 9); *Pfeifer Oil Transp. Co.* v. *The Ira S. Bushey*, 129 F. 2d 606, 607 (C. C. A. 2); *Stokes* v. *United States*, 114 F. 2d 83, 85 (C. C. A. 2); *Smith* v. *Royal Ins. Co.*, 125 F. 2d 222, 224 (C. C. A. 9). The courts have often ruled that inferences or conclusions drawn by the trial court from stipulated facts, testimony which has not been personally heard, or undisputed evidence, do not preclude the reviewing court from drawing other inferences also permissible from such evidence. *Sun Insurance Office, Ltd.* v. *Be-Mac Transportation Co.*, 132 F. 2d 535, 536 (C. C. A. 8); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (C. C. A. 8); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279, (C. C. A. 7). And see *Banister* v. *Solomon*, 126 F. 2d 740, 741 (C. C. A. 2); *Himmel Bros. Co.* v. *Serrick Corp.*, 122 F. 2d 740, 742 (C. C. A. 7);

Stewart v. *Ganey*, 116 F. 2d 1010, 1013 (C. C. A. 5).[25] This was the rule in equity before the adoption of the Federal Rules of Civil Procedure, and it was not the purpose of Rule 52 to change the prior equity practice. *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. C. A. 9); *State Farm Mut. Auto. Ins. Co.* v. *Bonacci*, 111 F. 2d 412, 414–415 (C. C. A. 8); *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. C. A. 3).

In any event, since the evidentiary facts are undisputed, the "findings of fact" of the district court on the ultimate legal issue—whether the boners were petitioners' employees—were subject to review by the circuit court of appeals if such "findings" were based upon a mistaken conception of the employment relationship under the Act. As we have indicated in Point I, the district court based its "findings" upon the erroneous theory that the contractual arrangements and common-law concepts were controlling in determining the scope of employment under the Act. "Findings of fact" resting upon an erroneous construction of the applicable statute are not regarded as conclusive in reviewing administrative determinations; and we know of no authority which requires that "findings" of a trial court be treated as conclusive when they are subject to the same legal infirmity.

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[25] For a more elaborate treatment of this subject, see Stern, *Review of Findings of Administrators, Judges & Juries: A Comparative Analysis*, 58 Harvard Law Review 70, 112–122.

III

EVEN THOUGH THE BONERS WERE NOT PETITIONERS' EMPLOYEES, THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED ON THE GROUND THAT PETITIONERS SHIPPED GOODS IN VIOLATION OF SECTION 15 (A) (1)

Section 15 (a) (1) makes it unlawful for any person

> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employees was employed in violation of section 6 or section 7 * * *.

It is not denied that all of the boners worked in excess of 40 hours a week and have not been paid overtime in accordance with Section 7 (R. 161). Petitioners know that the prescribed labor standards are not being met in their employment. Petitioners also know that the boned beef is produced for interstate shipment. Consequently, the shipment of such goods by petitioners in interstate commerce is plainly within the prohibition of Section 15 (a) (1). See *United States* v. *Darby*, 312 U. S. 100, 121, 122; *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449 (C. C. A. 5); *Enterprise Box Co.* v. *Fleming*, 125

F. 2d 897 (C. C. A. 5); *Walling* v. *Belikoff Bros.*, 147 F. 2d 1008 (C. C. A. 2); *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. C. A. 10); *Walling* v. *Acosta*, 140 F. 2d 892 (C. C. A. 1).

Therefore, even though the boners were not petitioners' employees, the failure to pay the boners "hired" by the contractors—who, under any view, were certainly "employees" entitled to protection under the Act—resulted in violations of Section 15 (a) (1) which would warrant the issuance of the injunction as ordered by the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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APRIL 1947.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201.

SEC. 3. As used in this Act—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

SEC. 11.

* * * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

USE OF WORDS "EMPLOYED, PERMITTED, OR SUFFERED TO WORK" IN CHILD LABOR LEGISLATION AT TIME OF ENACTMENT OF FAIR LABOR STANDARDS ACT

Alabama (Code 1940, title 26, ch. 7, Art. 3, sec. 343).

Arizona (Code 1939, sec. 56–301).

California (Labor Code, Div. II, Pt. 4, sec. 1290).

Colorado (1935 Stats. ch. 97, sec. 182).

Delaware (Rev. Code 1935, #3601, sec. 11).

District of Columbia (D. C. Code 1940, sec. 36–201).

Florida (Laws 1913, ch. 6488, sec. 3).

Georgia (Code 1933, ti. 54, sec. 54–303).

Idaho (Code 1932, Vol. 3, ch. 8, sec. 43–801, 43–804).

Illinois (Rev. Stats. 1945, ch. 48, sec. 17).

Kansas (General Statutes, ch. 38–601).

Louisiana (General Statutes, ti. 34, ch. 5, sec. 4319).

Maine (Rev. Stat. 1944, ch. 25, secs. 17–18).
Maryland (Code 1939, Art. 100, sec. 4).
Michigan (Compiled Laws of 1929, sec. 8325).
Minnesota (Masons Stats. 1927, sec. 4094, 4100, 4106).
Missouri (Rev. Stats. 1939, sec. 9619).
Nebraska (Rev. Stats. 1943, ch. 48, secs. 301–302, 310).
New Hampshire (Public Laws 1926, ch. 118, sec. 18).
New Jersey (Rev. Stats. 1937, Ti. 34, sec. 2–5).
New Mexico (Comp. Stat. 1929, sec. 80–101).
North Carolina (P. L. 1937, ch. 317, sec. 1).
North Dakota (1923, ch. 155, sec. 1).
Ohio (Genl. Code, 1940, sec. 12993).
Oregon (Comp. Laws 1940, sec. 102–401).
Rhode Island (Pub. Laws 1936, ch. 2360, sec. 3).
Tennessee (Code 1932, sec. 5314).
Utah (1933, ch. 11, sec. 1).
Vermont (Pub. Laws 1933, sec. 6583).
Virginia (Code 1942, sec. 1808a).
West Virginia (Code, 1931, ch. 21, Art. 6, secs. 1–2).
Wyoming (Rev. Stat. 1931, sec. 20–301).

USE OF WORDS "EMPLOYED OR PERMITTED TO WORK" IN CHILD LABOR LEGISLATION AT TIME OF ENACTMENT OF FAIR LABOR STANDARDS ACT

Arkansas (Pope's Digest, 1937, vol. II, sec. 9067) (Acts 1915, p. 1505).
Connecticut (Genl. Stats. cum. supp. 1935, ch. 279, sec. 1604c; supp. 1939, ch. 279, sec. 1320e).
Georgia (Code 1933, Title 54, sec. 54–301).
Idaho (Code 1932, vol. 3, ch. 8, sec. 43–802).
Indiana (Burns' Stats. 1933, sec. 28–518).

Kentucky (R. S. 1946), ch. 339, sec. 339.010).
Massachusetts (Genl. Laws, 1932, ch. 149, sec. 60).
Minnesota (Mason's Stats. 1927, sec. 4103).
Mississippi (Code 1930, sec. 4645).
Montana (R. C. 1935, sec. 3095).
New Hampshire (P. L. 1926, ch. 118, sec. 22; ch. 176, sec. 14, 16).
New Jersey (R. S. 1937, ti. 34, sec. 2–2).
Oklahoma (Stats. 1931, sec. 10833).
Oregon (Comp. Laws 1940, sec. 102–405).
Pennsylvania (Purdon's Stats. 1936, Ti. 43, sec. 42).
West Virginia (Code 1931, c. 21, Art. 6, secs. 3, 7).
Wisconsin (Stats. 1945, sec. 103.23).

FEDERAL CHILD LABOR STATUTES USING WORDS "EMPLOYED OR PERMITTED TO WORK"

Act of September 1, 1916, c. 432, 39 Stat. 675.
Act of February 24, 1919, c. 18, 40 Stat. 1057, 1138.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

No. 562.—October Term, 1946.

Rutherford Food Corporation and the George Kaiser Packing Company, Petitioners, v. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 16, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

The Administrator of the Wage and Hour Division of the Department of Labor brought this action to enjoin the Rutherford Food Corporation and the Kaiser Packing Company from further violating the Fair Labor Standards Act.[1] The Administrator alleged that the defendants had repeatedly failed to keep proper records and to pay certain of its employees overtime as required by § 7 of the Act.[2] The District Court refused to grant the injunction. The Circuit Court of Appeals reversed on appeal, and directed the entry of the judgment substantially as prayed for. *Walling* v. *Rutherford Food Corporation*, 156 F. 2d 513. We brought the case here because of the importance of the issues presented by the petition for certiorari to the administration of the Act.

The Fair Labor Standards Act of 1938, enacted June 25, 1938, is a part of the social legislation of the 1930's of the same general character as the National Labor Relations Act of July 5, 1935, 49 Stat. 449, and the Social Security Act of August 14, 1935, 49 Stat. 620. Decisions that define the coverage of the employer-employee relationship

[1] 52 Stat. 1060.

[2] 29 U. S. C. § 207.

under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act. See *Board* v. *Hearst Publications*, 322 U. S. 111; *United States* v. *Silk*, Nos. 312 and 673, decided today.

The petitioners are corporations of Missouri authorized to do business in Kansas. The slaughterhouse of the Kaiser Packing Company, the place of the alleged violations with which we are concerned, and the principal place of business of that company, is in Kansas City, Kansas, from which it ships meat in interstate commerce. Since 1942 most of its product has been boned beef. The petitioner, Rutherford Food Corporation, has its principal place of business and its plant for processing meat products in Kansas City, Missouri. In 1943, Rutherford bought 51% of the stock of Kaiser in order to assure itself of a constant supply of boned beef for contracts it had with the U. S. Army. Kaiser had been operating and continued to operate at a loss, and Rutherford advanced more than $50,000 to Kaiser between March, when Rutherford bought the Kaiser stock, and July, 1943. To assure itself of a continued supply of meat, Rutherford leased Kaiser's facilities and took over operation of the slaughterhouse in July. In May, 1944, the lease was terminated and Rutherford's stock interest in Kaiser sold, so that Kaiser might qualify for subsidies granted by the Defense Supplies Corporation to unaffiliated nonprocessing slaughterers under its Regulation No. 3.[3]

Prior to 1942 Kaiser had one hourly paid employee who acted as a combined butcher, beef boner and order filler. During 1942, in order to be able to furnish beef boned to Army specifications to the Army under contract, Kaiser entered into a written contract with one Reed, an experienced boner, which provided that Reed should assemble

[3] 8 F. R. 10826; 8 F. R. 14641; 9 F. R. 1820.

a group of skilled boners to do the boning at the slaughter-house. The terms of the contract were that Reed should be paid for the work of boning an amount per hundred-weight of boned beef, that he would have complete control over the other boners, who would be his employees, that Kaiser would furnish a room in its plant for the work known as the boning vestibule, into which the carcasses of cattle slaughtered by Kaiser would be moved on overhead rails by Kaiser employees, that Kaiser would also furnish barrels for the boned meat which would be washed and moved out of the vestibule by Kaiser's employees. Reed abandoned the work in February, 1943, and the work was taken over under an oral contract by one of the boners who had worked with him. This boner, Schindel, also abandoned the work in May, 1944, and an oral contract was then made by the company with Hooper and Deere, who had worked with Schindel. After a few months Deere left, at which time Hooper entered into a written contract substantially like the one between Kaiser and Reed, save that it provided for rent to be paid by Hooper for the boning room, although as a matter of fact no rent was ever paid. The District Court found that since the boning work had started in 1942, the money paid by Kaiser had been shared equally among all the boners, except for a short time after Hooper took over the work when he paid some of the boners by the hour. It was stipulated further that the boners owned their own tools, although these consisted merely of a hook to hold the meat, a knife to cut it, a sharpener for the knife, and a leather belt (apron). Although the C. I. O. union which was the representative of the workers of the company insisted that the boners be members, and although the written contracts provided that they should join, it was stipulated that the union dues of the boners were not checked off and that the boners were not subject to the authority of the union steward at the plant.

The slaughterhouse operations, of which the boning is a part, are carried on in a series of interdependent steps. The cattle are slaughtered, skinned and dressed in the killing room, and the carcasses are moved thence on overhead rails into an overnight cooler by employees of Kaiser. The next day they are moved into another cooler and then into the boning vestibule, on the same overhead rail. They move around the boning room on the rail, each boner cutting off a section for boning. The boneless meat is put into barrels, or passed to a trimmer, an employee of Kaiser, who trims waste matter from the boned meat. Waste is put into other barrels. The barrels are moved from the boning room by employees of Kaiser into another room, called the dock, where the meat is weighed and put on trucks. Kaiser has never attempted to control the hours of the boners, but they must "keep the work current and the hours they work depend in large measure upon the number of cattle slaughtered." 156 F. 2d 513, 515. It is undisputed that the president and manager of Kaiser goes through the boning vestibule many times a day and "is after the boners frequently about their failure to cut all of the meat off the bones."

The Administrator thought these facts brought the boners within the classification of employees, as that term is used in the Act. But the District Court thought that they were independent contractors, and denied the injunction sought by the Administrator. The Circuit Court of Appeals, however, said: "The operations at the slaughterhouse constitute an integrated economic unit devoted primarily to the production of boneless beef. Practically all of the work entering into the unit is done at one place and under one roof. . . . The boners' work alongside admitted employees of the plant operator at their tasks. The task of each is performed in its natural order as a contribution to the accomplishment of a common objective." In its view the test for determining who was an employee under the Act was not the common law test of

control, "as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law . . ." It concluded that the "underlying economic realities . . . lead to the conclusion that the boners were and are employees of Kaiser . . ." 156 F. 2d 513, 516–17.

The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers. It was sought to accomplish this purpose by the minimum pay and maximum hour provisions and the requirement that records of employees' services be kept by the employer.[4] To make the method effective, the Act contains a section granting to the district courts of the United States jurisdiction to enjoin certain violations of the Act here involved, relating to the keeping of records of employment and the paying of overtime.[5] Whether or not the acts charged in this complaint violate the Act depends, so far as the meat boners are concerned, upon a determination as to whether either or both respondents are employers of the boners. As our conclusion requires further action in the trial court to frame the injunction, we shall treat only the question of the relationship of the boners to the alleged employers. We shall not in our consideration undertake to reach any conclusion as to the appropriate form of an injunction. We pass only upon the question whether the boners were employees of the operator of the Kansas plant under the Fair Labor Standards Act.

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[4] 52 Stat. 1060, §§ 2, 6, 7, 11 (c). *United States* v. *Darby*, 312 U. S. 100, 125; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–78.

[5] 52 Stat. 1060, §§ 17, 15, 7 (a), 11 (c).

As in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act. Provisions which have some bearing appear in the margin.[6] The definition of "employ" is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, § 12.[7] We have decided that it is not so broad as to include those "who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Walling* v. *Portland Terminal Co.*, No. 336, this term, decided February

[6] 52 Stat. 1060, § 3:
"As used in this Act—

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . .
"(e) 'Employee' includes any individual employed by an employer.

"(g) 'Employ' includes to suffer or permit to work."

[7] Note 11 in the brief for the United States summarizes the relevant data:

"At the time of the enactment of the Fair Labor Standards Act, the phrase 'employed, permitted or suffered to work' was contained in the child labor statutes of thirty-two States and the District of Columbia. The same phraseology appeared in the Uniform Child Labor Laws recommended in 1911 and in 1930 by the National Conference of Commissioners on Uniform State Laws (Child Labor Bulletin, Vol. I, No. 2, August 1912; Proceedings of the National Conference, 1930), in the Standard Child Labor Law recommended in the Child Labor Legislation Handbook compiled by Josephine C. Goldmark (See *e. g.*, issue of 1904, p. 11), and in the Standards Recommended for Child Labor Legislation by the International Association of Governmental Labor Officials. The phrase 'employed or permitted to work' was found in seventeen State statutes as well as in the Federal statutes held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20. The statutes are cited in the Appendix to this brief, *infra*, pp. 59–60."

17, 1947. In the same opinion, however, we pointed out that "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." Slip op., p. 3. We have said that the Act included those who are compensated on a piece rate basis. *United States* v. *Rosenwasser*, 323 U. S. 360. We have accepted a stipulation that station "red-caps" were railroad employees. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 391. There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees. See *United States* v. *Silk*, *supra*; compare *Roland Electrical Co.* v. *Walling*, 326 U. S. 657; *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173. We conclude, however, that these meat boners are not independent contractors. We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an "independent contractor" label does not take the worker from the protection of the Act.[8]

The District Court was of the view that:

> "The right to contract is not only an inherent right but a constitutional right, and independent contracts, as a method of quantity production of boned beef, have not been uncommon in the packing business, generally. . . . The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and

[8] See *Walling* v. *American Needlecrafts*, 139 F. 2d 60; *United States* v. *Vogue, Inc.*, 145 F. 2d 609; *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944.

most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be equitably taken care of by payment on an hourly basis out of the boning money."

We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

We therefore affirm the conclusion to that effect of the Circuit Court of Appeals and modify the direction of the judgment of that court "for entry of a judgment substantially as prayed," so as to leave the District Court free to frame its decree in accordance with this decision.

It is so ordered.